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No.

In The
Supreme Court of the United States
October Term, 1993

PETER BRANTON,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a radio listener who lodges a complaint with the Federal Communications Commission alleging a violation of the FCC's broadcast indecency policy have standing to seek appellate review of the agency's denial of the complaint?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Peter Branton, the respondents Federal Communications Commission and United States of America, and intervenors National Public Radio, Public Broadcasting Service, Media Access Project, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, People for the American Way, and Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights.

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PETITION FOR WRIT OF CERTIORARI

Peter Branton petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment in *Peter Branton v. Federal Communications Commission*, 993 F.2d 907 (D.C. Cir. 1993) declining to review Mr. Branton's appeal of an FCC ruling on his complaint of violations of the FCC's broadcast indecency rules.

OPINIONS BELOW

The *Opinion* of the court of appeals is reported at 993 F.2d 907 (D.C. Cir. 1993) and is reproduced in the Appendix (App.) at 1a. The FCC's *Letter Ruling* is pub-

lished at 6 FCC Rcd. 610 (1991) and is reproduced in the Appendix at 15a.

JURISDICTION

The *Opinion* (App. at 1a) and *Judgment* (App. at 12a) of the court of appeals were entered on June 1, 1993, as was an order withholding issuance of the mandate pending any timely petition for rehearing or suggestion for rehearing *en banc*. Orders denying a petition for rehearing and a suggestion for rehearing *en banc* were entered September 30, 1992 (App. at 13a, 14a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 1464. Broadcasting obscene language

Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

STATEMENT OF THE CASE

Since 1927, Congress has prohibited the broadcast of "any obscene, indecent, or profane language." Radio Act of 1927 § 29, 44 Stat. 1172 (1927), *codified* at 18 U.S.C. § 1464. The Communications Act of 1934, as amended, empowers the Federal Communications Commission to impose administrative sanctions for violations of Section 1464, including issuing warnings, imposing fines and revoking licenses. 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D). The principal means by which the FCC becomes aware of violations of Section 1464 is the filing of complaints from radio listeners or television viewers, which are reviewed by the Enforcement Division of the FCC's Mass Media Bureau.

In February, 1989, Petitioner Peter Branton lodged a complaint with the FCC in response to a news story he heard at 6:25 p.m. over the National Public Radio program "All Things Considered."[1] The segment, which was part of a story about organized crime, included the broadcast of a wiretap of a telephone conversation in which reputed mobster John Gotti repeatedly used variations of the word "f___." The word occurred ten times in the 110-word excerpt. NPR made no attempt to mask the words in its report. It warned its listeners only that "the following story contains some very rough language" and that "Gotti's threats are extremely profane." *Letter Ruling*, 6 FCC Rcd. at 610, App. at 17a.

The FCC's Mass Media Bureau concluded that the NPR broadcast did not violate Section 1464 or the FCC's indecency standards,[2] and the full Commission, over one dissent, denied reconsideration. The Commission acknowledged that the "repetitious use of coarse words" was "objectionable to many persons," but it concluded that such words were not "gratuitous, pandering, titillating and otherwise 'patently offensive'" when used in a "legitimate news report." *Letter Ruling*, 6 FCC Rcd. at 610, App. at 16a. Commissioner Duggan dissented. He found that NPR's broadcast was "patently offensive to civilized and cultivated people," and that the Commission's ruling represented a change in FCC policy: "Although the Commission has twice declined to adopt an express 'news exemption' for indecency enforcement, it may have implicitly created such an exemption here." *Id.* at 611, App. at 21a.

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[1] Mr. Branton heard the broadcast over radio station WSMC-FM, located in suburban Chattanooga, Tennessee.

[2] The FCC defines "indecent programming" as "programming 'that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.'" *Letter Ruling* at 610 (citations omitted), App. at 15a.

Mr. Branton appealed the Commission's decision to the court of appeals on the ground that the decision was an unexplained departure from the FCC's prior, announced indecency policy and was, accordingly, arbitrary and capricious. Following oral argument, the court of appeals requested supplemental briefing on the question whether the Commission's decision was unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985).

The court of appeals ultimately held that it could not reach the question briefed by the parties because Mr. Branton did not have standing to challenge the Commission's decision, a ground no party had urged upon the court. 993 F.2d 907 (D.C. Cir. 1993), App. at 2a.[3] While the court acknowledged that "an offense to one's sensibilities may indeed constitute an injury," and that Mr. Branton had suffered "a discrete, past injury," the court held that he had not suffered an injury-in-fact because he sought "neither damages nor other relief," but only "the imposition of a sanction in the hope of influencing another's future behavior." *Id.* at 909, App. at 4a. According to the court, Mr. Branton's complaint of an "isolated indecency broadcast" was insufficiently immediate, although Mr. Branton "might be in a better position" if he could allege that programming "repeatedly violated the indecency standard." *Id.* at 910, App. at 6a. Relying on *Los Angeles v. Lyons*, 461 U.S. 95 (1983), the court held that it was "mere conjecture that a radio station will again broadcast, at a time when the petitioner is listening, indecencies that would be proscribed under 18 U.S.C. § 1464." *Id.* at 909, App. at 5a-6a.

The court also held that Mr. Branton failed to demonstrate that his complaint could be redressed by favorable FCC action. It was "conjectural" whether FCC sanc-

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[3] After the parties filed supplemental briefs in response to the court's initial concern as to the relevance of *Heckler v. Chaney*, the court did not pursue that line of thought any further. The *Opinion* makes no reference to the *Chaney* case.

tions "would cause any radio station(s) in the area to broadcast any fewer indecent programs in the future." *Id.* at 911, App. at 9a. The court reasoned that even if the FCC imposed a fine on a radio station, the station might decide that "the benefits of broadcasting indecent language ... outweigh the costs of [paying fines] to the Government." *Ibid.* Since the court did not know "the elasticity of demand for broadcast indecency," it had "no confidence" that its "reversal of the agency's decision would serve at all to protect the petitioner from future exposure to broadcast indecency." *Id.* at 911, 912, App. at 10a.

Intervenors People for the American Way and Washington Area Citizens Coalition Interested in Viewers Constitutional Rights, groups which had intervened in support of the FCC's decision, petitioned for panel rehearing and rehearing *en banc* on the grounds *inter alia* that the court had wrongly decided the question of standing. The FCC agreed: In response to the rehearing petition the FCC advised the court that it had "erred in its conclusion that petitioner lacked standing" and that the panel's decision was "inconsistent with the approach to viewer/listener standing that this Court and the FCC have followed." *FCC Response to Petition for Rehearing* at 1, 2. "[N]o court has even suggested ... that the immediacy element of constitutional standing analysis, as applied to a viewer/listener's challenge to FCC rejection of an argument related to broadcast programming, required anything more than that the viewer/listener reside within the service area of the station at issue." *Id.* at 3 (footnote omitted). The Commission further told the court that, with respect to causation and redressability, it was a "fundamental assumption underlying the FCC's enforcement of Section 1464 ... that such enforcement will deter future violations." *Id.* at 7.

The court of appeals denied the petition for rehearing and suggestion for rehearing *en banc*. Three judges voted to rehear the case *en banc*. App. at 13a.

REASONS FOR GRANTING THE WRIT

This case presents an issue of indisputable consequence to the public interest: Whether a radio listener or television viewer, having filed a complaint with the FCC which results in a published adverse ruling, has standing as a "representative[] of the public interest" (*Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942)) to seek review in the court of appeals. This is an issue that, until the decision of the lower court, had been resolved uniformly in favor of listener standing. As the Seventh Circuit has stated, "listener standing is not unusual," in fact "'[t]he legality of listener standing is so well accepted that the point is never raised in the present FCC litigation.... *[L]isteners have been implicitly granted standing to challenge just about every form of FCC program regulation or of licensee programming activity.*'" *Maier v. FCC*, 735 F.2d 220, 228-29 (7th Cir. 1984) (emphasis in original) (quoting *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 411 n.17 (D.C. Cir. 1975) (separate statement of Bazelon, C.J.)). *See also, In Re Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, 98 (1982) ("*Standards for Determining Standing*") ("The legality of listener standing is so well-accepted [that] we have often discussed the issue in rather summary fashion").

The judgment of the court of appeals below is inconsistent with the reasoning of every court of appeals which has considered the question of listener standing since the D.C. Circuit's seminal decision in *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). It is also inconsistent with the stated position of the Federal Communications Commission, which advised the court of appeals in the proceeding below:

> The panel's reasoning in this case -- that there was no cognizable or redressable injury -- appears inconsistent with the approach to

> viewer/listener standing that this Court and the FCC have followed since this Court's decision in [*United Church of Christ*]. To our knowledge, prior to this decision, no one has argued -- and no court has even suggested -- that the 'immediacy' element of constitutional standing analysis, as applied to a viewer/listener's challenge to FCC rejection of an argument related to broadcast programming, required anything more than that the viewer/listener reside within the service area of the station at issue.

FCC Response to Petition for Rehearing at 2-3 (footnote omitted).

The decision of the court of appeals eviscerates the ability of listeners to seek prompt enforcement of FCC rules. By finding that Article III restricts the power of listeners to challenge the actions of broadcasters, the court significantly limits opportunities for listeners "individually, in small groups or en masse" to provide their "fresh and vital perspective" or "bring to light information about a licensee's performance that [the FCC would] not have or might otherwise overlook." *Standards for Determining Standing*, 82 FCC 2d at 99-100.

Review by this Court is required to resolve this newly unsettled area of the law of Article III standing.

1. The standards governing standing to appeal agency action are not in dispute. In order to satisfy Article III, a complainant must allege a personal injury that is fairly traceable to the defendant's allegedly unlawful conduct and is likely to be redressed by the relief requested. *Lujan v. Defenders of Wildlife*, 504 U.S. ___, 112 S.Ct. 2130, 2135 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984). A party possessed of standing to appeal agency action must demonstrate that the agency's order caused injury-in-fact and that

the injury is within the zone of interest protected by the agency. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). The APA's judicial review provision, 5 U.S.C. § 702, is "generous" and "should be construed 'not grudgingly but as serving a broadly remedial purpose.'" *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395 (1987) (citations omitted).

Once a party is found to be "aggrieved" (5 U.S.C. § 702), "[a] separate indication of Congressional intent to make agency action reviewable under the APA is not necessary." Rather, judicial review is available "absent some clear and convincing evidence of legislative intent to preclude review." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 231 n.4 (1986). Accordingly, "[t]he essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.[]" *Clarke*, 479 U.S. at 399 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984)). In addition to the broad review permitted under the APA, this Court has recognized that Section 402 of the Communications Act, 47 U.S.C. § 402, "is an example of a statute granting an explicit right of review to all persons adversely affected or aggrieved by particular [FCC] actions." *Clarke*, 479 U.S. at 394 n.8.

a. The court of appeals erred in finding that listeners such as Mr. Branton suffer no cognizable injury-in-fact when broadcasters violate indecency prohibitions established by Congress. The D.C. Circuit previously has stated that there is "no reason to believe ... that Congress ... had any thought that electrical interference and economic injury were to be the exclusive grounds for standing or that it intended to limit participation of the listening public to writing letters to the Complaints Division of the Commission." *United Church of Christ*, 359 F.2d at 1001.

That an offense to a listener's sensibilities constitutes the requisite "injury" was a critical assumption in this

Court's ruling in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978), the principal Supreme Court decision construing 18 U.S.C. § 1464. Indeed, *Pacifica Foundation* arose from the same circumstances as Mr. Branton's complaint, when "a man, who stated that he had heard the [challenged] broadcast while driving with his young son, wrote a letter complaining to the Commission." 438 U.S. at 730.

The logic underlying listener standing has been articulated by the courts time and time again, its core notion being the potentially intrusive nature of the broadcast medium. Because of the "uniquely pervasive presence in the lives of all Americans" (*id.* at 748) which broadcasters command, it is "the right of viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). This is particularly true for programming limitations such as 18 U.S.C. § 1464. "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica Foundation*, 438 U.S. at 738.[4]

With condign respect for the power of broadcasting to "intrude on the privacy of the home without prior warning as to program content," *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (citing *Ginsburg v. New York*, 458 U.S. 747, 756-57 (1982)), no court has questioned the validity of a broadcast indecency challenge by a listener on the ground that a cognizable "injury" was absent. The contrary position of the court of appeals implies, cynically, that a concerned

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[4] We recognize that agency standing and Article III standing need not be governed by the same test. The federal courts, however, have treated standing before the FCC and Article III standing identically. *See American Civil Liberties Union v. FCC*, 523 F.2d 1344, 1347 (9th Cir. 1975); *United Church of Christ*, 359 F.2d at 1000 n.8. The FCC also applies the Article III analysis. *Standards for Determining Standing*, 82 FCC 2d at 95-96.

listener "may avoid further offense by turning off the radio" -- a solution this Court has deemed as unpersuasive as "saying that the remedy for an assault is to run away after the first blow." *Pacifica Foundation*, 438 U.S. at 748-49.

b. The concept of listener standing to appeal FCC decisions -- arising from the courts' continual discernment of an injury-in-fact -- is well established. In *United Church of Christ*, the D.C. Circuit considered at length the question of listener standing to challenge the renewal of a broadcast license. The court held that listeners were "affected" or "aggrieved" parties within the meaning of 47 U.S.C. § 402(b), 359 F.2d at 1003; *see also American Legal Foundation v. FCC*, 808 F.2d 84, 88-91 (D.C. Cir. 1987).[5] The court, likening listeners to consumers in regulated industries, stated: "[t]here is nothing unusual or novel in granting the consuming public standing to challenge administrative actions." 359 F.2d at 1002. The court concluded that "unless the listeners -- the broadcast consumers -- can be heard, there may be no one to bring programming deficien-

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[5] While the appeal in this case was predicated upon 42 U.S.C. § 402(a) rather than Section 402(b), the difference has relevance only with respect to where the appeal may be brought -- it has no bearing on the question of standing. *Compare* 47 U.S.C. § 402(b)(6) ("any other person ... aggrieved" may seek review of certain Commission actions in the D.C. Circuit) *with* 28 U.S.C. § 2344 ("[a]ny party aggrieved" may seek review of agency actions in a court wherein venue lies). As this Court noted in *Scripps-Howard Radio*, "the two sections route appeals to different courts," a "differentiation ... in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform.... Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commissioners' order arose out of a proceeding not instituted by the licensee." 316 U.S. at 15-16 (footnote omitted). Relying on this statement, the Seventh Circuit concluded that there was "no reason to believe that the difference between the two sections relates to the issue of standing." *Maier v. FCC*, 735 F.2d 220, 228 (7th Cir. 1984). *See also American Civil Liberties Union v. FCC*, 523 F.2d 1344, 1346 (9th Cir. 1975) (finding listeners had standing in appeal brought under Section 402(a)).

cies or offensive overcommercialization to the attention of the Commission in an effective manner.... [T]hose 'consumers' willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the only ones 'having a sufficient interest' to challenge a renewal application." *Id.* at 1004-05.

Since *United Church of Christ*, the courts of appeals have held that listeners have standing to bring broadcaster or programming-related actions in a variety of contexts. For example, in *Llerandi v. FCC*, 863 F.2d 79 (D.C. Cir. 1988), the D.C. Circuit held that listeners had standing under the FCC's duopoly rules to challenge the assignment of two radio licenses. The court found that the purpose of the duopoly rules was "to assure (or at least enhance) diversification of viewpoints within the broadcast industry.... Listeners are, by definition, 'injured' when licenses are issued in contravention of the policies undergirding the duopoly rule." *Id.* at 85.

In *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984), the court held that listeners had standing to appeal the FCC's refusal to act on alleged violations of the fairness doctrine. The Seventh Circuit found that the fairness doctrine was "at the core of the 'public interest' standard in broadcast communications." Private parties may seek judicial review of the FCC's actions as "representatives of the listening public." *Id.* at 229. "[A] direct, concrete, particularized injury" -- separate and apart from residing in the listening area -- "is unnecessary for a party to have standing as a representative of the public interest." *Ibid.* The court further noted that "[j]ust as the Commission must rely on private persons or groups to represent the public interest in its regulation of broadcasters under the fairness doctrine, reviewing courts must rely on these same private parties in our supervision of the Commission's regulation." *Ibid.* Likewise, the Ninth Circuit held in *American Civil Liberties Union v. FCC*, 523 F.2d 1344, that the ACLU had standing as a representative

of consumers to challenge cable television regulations. *Id.* at 1346-48.

Particularly relevant to Petitioner's claim is *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975). In that case, listeners filed a complaint with the FCC concerning the candid nature of sexual topics on a daytime call-in radio program. The Commission issued sanctions against the broadcaster for violation of the statute at issue in Mr. Branton's complaint, 18 U.S.C. § 1464. When the broadcaster declined to seek further review for financial reasons, the Illinois Citizens Committee for Broadcasting and the Illinois Civil Liberties Union sought review of the order as representatives of the listening public. The court recognized their standing: "representatives of the public have a role in FCC proceedings concerning obscenity determinations -- as is indicated by our recognition that they have standing to challenge the substantive grounds of Commission action even where the licensee is willing to pay the forfeiture and thus acquiesces in the Commission's determination." 515 F.2d at 406. *See also id.* at 402; *id.* at 410-13 (statement of Bazelon, C.J., on denial of rehearing *en banc*).

c. These decisions are wholly consistent with established principles concerning injury-in-fact in the administrative agency context. Broadcasters stand as "proxies for the entire community" (*Red Lion*, 395 U.S. at 394) and may obtain and keep a broadcast license only if the FCC finds that the "public interest, convenience, and necessity" will thereby be served. 47 U.S.C. § 309(a).

Listeners have standing in this context for the same reasons that consumers have standing to challenge regulatory decisions of public utilities. *See United Church of Christ*, 359 F.2d at 1002. As Judge Posner has noted, "[t]he FCC was modeled on public utility and common carrier regulatory agencies, which are umpires between consumer and supplier interest; and typically any disappointed party to a public utility or common carrier proceeding can get

judicial review of the agency's action." *Maier*, 735 F.2d at 238 (Posner, J., dissenting). An injury suffered through a violation of an FCC rule is "analogous to that of a customer who is overcharged." *Id.* at 236. *See ICC v. Virginia-Washington Railroad and Navigation Co.*, 288 U.S. 14, 25-26 (1933); *Associated Industries v. Ickes*, 134 F.2d 694, 699-706 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943).

d. The court of appeals in this case addressed none of these principles and ignored the field of case law surrounding this issue. In fact, the only listener standing case even cited by the court of appeals was *United Church of Christ*, which it dismissed as limited to the context of license renewals (*see* 993 F.2d at 909-10, App. at 6a) -- a position flatly inconsistent with the cases that followed it. *See infra* pp. 10-12.

Indeed, upon brief reflection, it is clear that *United Church of Christ* could not logically be limited to the renewal context. Even the court of appeals apparently would not dispute that a listener such as Mr. Branton could challenge a license renewal on the ground that the broadcaster had violated 18 U.S.C. § 1464. But as the FCC pointed out to the panel, if the probability that Mr. Branton would again be subjected to an indecent broadcast is "too slight" (993 F.2d at 910, App. at 7a) to support his standing to appeal a complaint, then there is no reason to recognize his standing to appeal the renewal of a license, since the probability of his being subjected to an indecent broadcast would be equally slight. Thus, "there does not appear to be any basis for a distinction between the renewal and complaint context for purposes of the 'injury-in-fact' analysis." *FCC Response to Petition for Rehearing* at 6. Moreover, said the Commission, "recognizing standing only in the context of a renewal proceeding would undermine the FCC's policy determination that indecency complaints should be made, and adjudicated by the FCC, at the time of the broadcast rather than reserved for consideration at license renewal time, which occurs only every seven years for radio stations." *Ibid.*

Instead of looking to the listener standing cases, the lower court relied on this Court's decision in *Los Angeles v. Lyons*, 461 U.S. 95 (1983), for its conclusion that "the possibility that [Mr. Branton] will again 'some day' be exposed to a broadcast indecency lacks the imminence required." 993 F.2d at 909, App. at 5a. The FCC advised the court of appeals that its comparison to *Lyons* was "inapt."

> The Supreme Court in *Lyons* had good reason to conclude that law-abiding citizens would not likely encounter an illegal police chokehold in the future. By contrast, it is much more likely that a radio station in Branton's service area, broadcasting 24 hours a day, will at some future date broadcast indecent material at a time when Branton is listening.

FCC Response to Petition for Rehearing at 3 n.1.

The chance that Mr. Lyons "would again be stopped for a traffic violation ... [by a Los Angeles policeman] who would illegally choke him into unconsciousness" (461 U.S. at 105), is a far cry from the likelihood that Mr. Branton will again be subjected to "obscene, indecent, or profane language by means of radio communications" (18 U.S.C. § 1464). *Lyons* is distinguishable from this case because speeding is different from listening to the radio. Automobile drivers ordinarily seek to avoid confrontations with law enforcement officials. Radio listeners, by contrast, *purposefully* tune their radios in search of quality news programming, thus finding themselves, again and again, in circumstances which may subject them to offensive programming. To dismiss the possibility that Mr. Branton's experience may recur as "mere conjecture," "too remote," or "attenuated" (993 F.2d at 909, App. at 5a-6a) simply ignores the pervasiveness of radio and television programming in day-to-day life.

2. The court of appeals also erred in its assessment of the causation/redressability component of the standing analysis in this context. The court concluded that it was "conjectural whether the FCC's proceeding against the alleged broadcast indecency ... would cause any radio station(s) in the petitioner's area to broadcast any fewer indecent programs in the future," (993 F.2d at 911, App. at 9a) and speculated that radio stations might choose to pay the fines rather than change their programming. *Ibid.* Based on the "elasticity of demand for broadcast indecency," opined the court (993 F.2d at 911, App. at 10a), broadcasters might decide simply to pay fines to the Government rather than terminate indecent broadcasts.

a. The lower court's suggestion that broadcasters might intentionally flout Section 1464 on the theory that the "benefits" of indecent programming outweigh the "costs" of an FCC sanction -- in addition to being a strangely cynical statement from a court which historically has characterized broadcast licensees as stewards of the public interest -- reflects the court's inattention to other severe sanctions the FCC may impose. A broadcaster's vital asset -- its *sine qua non* -- is a license to operate which may be put in jeopardy by flagrant violations of the FCC's indecency rules. Congress has specifically instructed the Commission that it "may revoke any station license ... for violation of section ... 1464 of Title 18." 47 U.S.C. § 312(a)(6). Hence, the FCC reminded the court that "a forfeiture is [not] the only potential cost of a licensee's decision to broadcast material that it knows to be indecent. A licensee that makes such a decision ... also risks the loss of its license." *FCC Response to Petition for Rehearing* at 7 (citing 47 U.S.C. § 312(a)(6)). Alternatively, the Commission may issue a cease and desist order for a broadcaster's failure to observe Section 1464 (47 U.S.C. § 312(b)); or the agency may deny renewal of a license or grant merely a short term renewal. 47 U.S.C. §§ 307, 308. *See Pacifica Foundation*, 438 U.S. at 730 n.1.

These are avenues of recourse which undeniably redress indecency rule violations. As National Public Radio told the court of appeals, "In view of these potentially dire consequences of broadcasting material that the FCC may deem to be 'indecent,' no rational broadcaster can afford to make its programming judgments based on the sort of simplistic 'cost-benefit analyses' suggested by the [court]." *National Public Radio Response to Suggestion for Rehearing En Banc* at 2.

b. Even when the Commission grants an indecency complaint without imposing formal sanctions, such an action has serious and immediate consequences for a broadcaster. The order may be placed in the station's file and, if subsequent complaints are received, considered with those complaints for their aggregate effect. *See Pacifica Foundation*, 438 U.S. at 730. *See also id.* at 736 (FCC may take note of past program content when considering a license renewal), 737 (Commission may cancel the license of a broadcaster who "persists in a course of improper programming"). In *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976), the D.C. Circuit held that a broadcaster whose initial forfeiture was rescinded by the FCC nevertheless had standing to appeal the issuance of a letter warning the broadcaster of the consequences of future non-compliance. The court explained its view of the effect of such FCC action:

> [T]his letter ... has a concrete effect on this particular licensee.... The letter clearly indicates the Commission's belief that the station's actions *in this case* already constituted a violation, even if not a violation so flagrant as to merit a monetary penalty. If the Commission's order stands, this infraction becomes a permanent part of the station's record. This in all likelihood means that future violations by this station would stand

> to suffer harsher treatment than similar violations by other stations.

Id. at 1006 (emphasis in original; footnote omitted). *See also Maier*, 735 F.2d at 235 (Posner, J., dissenting).

Finally, even if the lower court's basic premise were sound (that an offending broadcaster's liability is limited to monetary forfeitures), the court misapprehended the causal effect that substantial fines have on a broadcaster's conduct. In today's climate, most broadcasters have limited resources. Thus, contrary to the court of appeals' sense of the matter, repeated rule violations met with repeated forfeitures are indeed likely to force a broadcaster either to cease its indecent broadcasts or to cease broadcasting altogether. In either case, it is hardly "conjectural" (993 F.2d at 911, App. at 9a) whether the forfeiture will bring about its desired effect.

In short, the court of appeals' conclusion that Mr. Branton's complaint lacks redressability ignores the range of sanctions available to the FCC. The assertion that broadcasters may ignore the Commission with impunity -- depending upon the "elasticity of demand for broadcast indecency" -- is contradicted by actual practice. Broadcasters who ignore Commission rulings do so at their peril.

The policy behind the court's decision serves neither the public interest, the FCC's regulatory responsibility, nor the broadcaster. A complaint unresolved until a license renewal proceeding may, because of the passage of time, be stale or unverifiable. A broadcaster, lacking an immediate adjudication of a complaint, may unwittingly continue to broadcast programming ultimately determined to be indecent or censor itself until license renewal time out of simple ignorance as to whether certain programming violates Section 1464. The broadcaster gets no intermediate relief, no warning, and no opportunity to conform its broadcasts to the FCC's rules except in a proceeding to grant or deny its

license renewal. That result is patently contrary to the procedure established by Congress -- a procedure which, until the decision at bar, had been well understood by the FCC and every court that had considered it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner,
Peter Branton

December 29, 1993

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 9, 1992 Decided June 1, 1993

No. 91-1115

PETER BRANTON, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., INTERVENORS

Petition for Review of an Order of the Federal Communications Commission

---

Ronald D. Maines for petitioner.

James M. Carr, Counsel, Federal Communications Commission ("FCC"), with whom *Robert L. Pettit*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, *Jane E. Mago*, Assistant General Counsel, FCC, and *Catherine G. O'Sullivan* and *James W. Lowe*, Attorneys, U.S. Department of Justice, were on the brief, for respondents. *Sue Ann Kanter*, Counsel, FCC, entered an appearance for respondents.

Timothy B. Dyk, with whom *Barbara McDowell*, *Theodore E. Miles*, and *Karen K. Christensen* (for National

Public Radio), *Paula A. Jameson* and *Nancy H. Hendry* (for Public Broadcasting Service), *J. Laurent Scharff* (for Radio-Television News Directors Association), and *Jane E. Kirtley* (for The Reporters Committee for Freedom of the Press) were on the brief, for intervenors National Public Radio, *et al.*

Elliot M. Mincberg, Walter A. Smith, Jr., and *Andrew Jay Schwartzman* were on the brief for intervenors People for the American Way and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights.

Before BUCKLEY, WILLIAMS, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: This is a petition for review of a letter ruling of the Federal Communications Commission refusing to take action against National Public Radio for allegedly broadcasting "obscene, indecent, or profane" language in violation of 18 U.S.C. § 1464. We hold that the petitioner lacks standing under Article III of the Constitution to challenge the FCC's decision.

I. BACKGROUND

In the early evening of February 28, 1989, NPR's news show "All Things Considered" ran a report on the trial of John Gotti, the alleged leader of an organized crime syndicate in New York. The report featured a tape recording of a wiretapped phone conversation between Gotti and an associate. In the 110-word passage that NPR excerpted from the tape recording for broadcast, Gotti used variations of "the f---- word" ten times. He used it to modify virtually every noun and in one instance even a verb ("I'll f---ing kill you"). NPR made no effort, such as substituting bleeps for any or all of these references, to render the passage less offensive to persons of ordinary sensibility.

Peter Branton, who heard the broadcast and was offended, filed a complaint with the Mass Media Bureau of the FCC. The Bureau concluded that the broadcast material in question was "not actionably indecent" and did not provide "the necessary legal basis for further Commission action" pursuant to 18 U.S.C. § 1464. Mr. Branton then wrote to the Commission asking how he could appeal the Bureau's decision. The Commission treated his letter as an Application for Review and, in a brief letter ruling (over one dissent), affirmed the Bureau's decision. The Commission explained that the Gotti tape was part of a "bona fide" news story; indeed, it had been introduced as evidence in the criminal trial that was the subject of that story. The Commission also noted its long-standing reluctance "to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners." Letter Ruling, 6 FCC Rcd. 610 (1991).

Mr. Branton now petitions for judicial review of the agency's decision not to proceed against NPR.

II. ANALYSIS

Article III of the Constitution of the United States limits the scope of the federal judicial power to the resolution of "cases" or "controversies." In order to implement that limitation, the Supreme Court has developed a doctrine of standing that, along with the other requirements for justiciability, assures that the federal judicial power is exercised only in "those disputes which confine federal courts to a role consistent with a system of separate powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 97 (1968). Because of "the scope and consequence of the review with which the judiciary is entrusted over executive and legislative action," the federal courts must "observe these bounds fastidiously." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

In order to establish standing under Article III, a complainant must allege (1) a personal injury-in-fact that is (2) "fairly traceable" to the defendant's conduct and (3) redressable by the relief requested. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The alleged injury must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), not "conjectural" or "hypothetical," *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Application of these familiar principles leads us to conclude that the petitioner lacks standing to seek review of the FCC no-action letter at issue here.

A. *Injury-in-fact*

In order to challenge official conduct one must show that one "has sustained or is immediately in danger of sustaining some direct injury" in fact as a result of that conduct. *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). This component of the standing doctrine serves both "to assure that concrete adversariness which sharpens the presentation of issues," *Baker v. Carr*, 369 U.S. 186, 204 (1962), and to prevent the federal courts from becoming "continuing monitors of the wisdom and soundness of Executive action...." *Allen v. Wright*, 468 U.S. at 790 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

The petitioner in this case alleges that he was injured because he was subjected to indecent language over the airwaves. While an offense to one's sensibilities may indeed constitute an injury, *see FCC v. Pacifica*, 438 U.S. 726, 748-49 (1978), a discrete, past injury cannot establish the standing of a complainant, such as Branton, who seeks neither damages nor other relief for that harm, but instead requests the imposition of a sanction in the hope of influencing another's future behavior. "[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make a case or controversy." *Lyons*, 461 U.S. at 103. *See also O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or

controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects").

If the petitioner suffers any continuing injury, we suppose it is in the nature of the increased probability that, should the NPR broadcast go unsanctioned, he will be exposed in the future to similar indecencies over the airwaves. Under established Supreme Court precedent, however, this marginal increase in the possibility of a future harm does not meet the "immediacy" requirement for Article III standing.

For example, in *Los angeles v. Lyons*, 461 U.S. at 95, the Court held that a person injured when a policeman subjected him to a chokehold did not have standing to seek an injunction prohibiting the police department from using that maneuver in the future. The Court reasoned that the plaintiff's single experience with a chokehold did not establish "a real and immediate threat that he would again be stopped for a traffic violation, or any other violation, by an officer or officers who would illegally choke him...." *Id*. at 105. *See also Rizzo v. Goode*, 423 U.S. 362, 372 (1976) (plaintiffs lack standing to seek injunction against future police misconduct because threat of repeat injury is too "attenuated"); *O'Shea*, 414 U.S. at 495-96. Similarly, in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), the Court held that an environmental group lacks standing to challenge policies that will allegedly result in the extinction of endangered species if the group cannot establish that its members will visit the habitat of those species in the near future. *Id*. at 2138 ("'some day' intentions [to travel] -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the 'actual or imminent' injury that our cases require") (emphasis in original).

In the present case, the possibility that the petitioner will again "some day" be exposed to a broadcast indecency lacks the imminence required under *Lyons, Rizzo*, and *Defenders of Wildlife*. It is mere conjecture that a radio station will again broadcast, at a time when the petitioner is listening,

indecencies that would be proscribed under 18 U.S.C. § 1464 (as he would have us interpret that statute). While there is, of course, some chance that somewhere, at some time, the petitioner may again be exposed to a broadcast indecency as a result of the Commission's decision, that possibility seems to us far too remote and attenuated to establish a case or controversy under Article III.

Nothing in *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966) (*UCC*), is to the contrary. In that case, we held that "responsible and representative groups" in a broadcaster's listening area have standing to challenge the broadcaster's application for a renewal license. The appellants there alleged that a TV licensee had failed to "give a fair and balanced presentation of controversial issues, especially those concerning Negroes," in violation of the Fairness Doctrine and of the licensee's obligation to operate its station in the public interest. *Id.* at 1000 & 998-99. The court explained that "[s]ince the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience." *Id.* 1002.

UCC is not controlling in the present case for two reasons. First, the appellants in *UCC* alleged that the licensee in question was engaged in a continuing pattern of inappropriate and discriminatory broadcasting, which the FCC by renewing its license had in effect extended. In contrast, the appellant in the present case challenges an FCC determination regarding an isolated indecency broadcast at a single moment in the past. He does not allege a continuing course of misconduct, and there is simply too little reason to believe that the harm to him will ever recur. A listener who alleges that a broadcaster has repeatedly violated the indecency standard might be in a better position to argue that he is subject to a continuing harm or at least an increased likelihood of the harm recurring. *But cf. Lyons*, 461 U.S. at 105 (allega-

tion that Los Angeles policy "routinely apply chokeholds" fails to establish prior victim's standing).

Second, in the years since *UCC*, the Supreme Court has repeatedly emphasized the "immediacy" element of the injury-in-fact requirement. *See Defenders of Wildlife*, 112 S. Ct. at 2130 (1992); *Lyons*, 461 U.S. at 96 (1983); *Rizzo*, 432 U.S. at 362 (1976); *O'Shea*, 414 U.S. at 488 (1974). Accordingly, *UCC* must be understood as a creature of the context from which it arose, *viz.* a license renewal proceeding, which is inherently future oriented.

In sum, the petitioner fails to demonstrate that the FCC's decision not to take action against NPR causes him an injury that is sufficiently "immediate" to establish his standing to challenge that decision. The marginal increase in the probability that he will be exposed to indecent language in the future if NPR is not sanctioned is simply too slight to generate a case or controversy proper for resolution by an Article III court.

B. *Causation/Redressability*

Even if the harm to the petitioner here were sufficiently immediate to make out an Article III "injury," he would not be able to show that his injury "fairly can be traced to the challenged action" and would be "redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 38 (1976). Causation and redressability are separate requirements, as is apparent in a case (such as *Allen v. Wright*) where the relief requested goes beyond mere cessation of the official conduct being challenged (there, tax exemption for schools that discriminate on the basis of race) to include additional relief (*viz.* denial of tax exemption to "a considerably broader class of private schools"). 468 U.S. at 747, 753 n.19. The two requirements tend to merge, however, in a case such as this where the requested relief consists solely of the reversal or discontinuation of the

challenged action. *Id.* at 759 n.24; *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 670 (D.C. Cir. 1987).

As an initial matter, it should be remembered that the petitioner in the present case is not himself in any way subject to the FCC decision he seeks to challenge. His probabilistic injury (such as it is) "results from the independent action of some third party not before the court," *i.e.*, NPR or some other broadcaster that may in the future offend him with an indecent broadcast. *Simon*, 426 U.S. at 42. Under these circumstances, it is "substantially more difficult" for him to establish causation and redressability. *Warth v. Seldin*, 422 U.S. at 505.

The Supreme Court is particularly disinclined to find that the causation and redressability requirements are satisfied where a complainant challenges only an Executive Branch decision not to impose costs or penalties upon some third party. For example, in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the Court held that a parent does not have standing to challenge the state's decision not to enforce a child support statute against the other parent of their illegitimate child. The Court reasoned that it was "at best ... only speculative" that the requested relief (prosecuting and jailing the other parent) would result in the payment of support. *Id.* at 618. Similarly, in *Simon*, 426 U.S. at 26, the Court held that a low-income individual does not have standing to challenge an IRS regulation establishing the amount of free medical care that a charitable hospital must provide in order to maintain its tax-exempt status. The Court explained that it was "purely speculative" whether the tax regulation caused such hospitals to provide less service than they would otherwise provide free of charge; it was "equally speculative" whether increasing the amount of free service required for tax exemption would in fact increase the provision of free services, since "[i]t is just as plausible that the hospitals ... would elect to forgo favorable tax treatment to avoid the undetermined financial drain" of providing more free treatment. *Id.* at 42-43.

Finally, in *Allen v. Wright*, 468 U.S. at 737, the Court held that minority group parents of public school children lack standing to challenge the legality of a tax exemption insofar as it benefits private schools that discriminate on the basis of race. The parents claimed that the tax exemption facilitated enrollment of white children in the private schools to the detriment of the parents' interest in access to desegregated public education. The Court noted that "the links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak" to establish standing, *id.* at 759; it was "entirely speculative" whether withdrawal of the tax exemption would lead any school to change its exclusionary policy or cause parents to transfer their children from a private to a public school in sufficient numbers to "have a significant impact on the racial composition of the public schools. *Id.* at 758.

In the present case, it is at least equally conjectural whether the FCC's proceeding against the alleged broadcast indecency of February 28, 1989 would cause any radio station(s) in the petitioner's area to broadcast any fewer indecent programs in the future. As in the cases discussed above, any favorable impact of the official action that the complainant seeks to compel depends utterly upon the actions of "third part[ies] not before the court," *Simon*, 426 U.S. at 42, whose behavior is difficult to predict.

For example, radio stations might well decide that the benefits of broadcasting indecent language of the sort petitioner here challenges outweigh the costs of making certain payments to the Government (here in the form of fines rather than of taxes). Predicting the reaction of "public" radio stations to a monetary fine is particularly difficult because such stations are non-profit entities. *See* Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. Pa. L. Rev. 497, 568-69 (1981) ("the patrons of a nonprofit are generally much less able to look out for themselves than are the shareholders in a business corporation"). In addition, as broadcast journalists, even for-profit broadcasters undoubtedly make program-

ming decisions in part with an eye to non-monetary factors, such as their own conception of journalistic integrity. *See* Radio-Television News Directors Association Code of Ethics (stating members' responsibility, inter alia, "to gather and report information of importance and interest to the public accurately, honestly and impartially" and to "evaluate information solely on its merits as news").

As a result, the court can have no confidence that the FCC's failure to impose a sanction upon NPR will lead it or any other broadcaster to injure the petitioner in the future. Or to put the matter conversely, it is speculative whether our reversal of the agency's decision would serve at all to protect the petitioner from future exposure to broadcast indecency.

This holding (and the Supreme Court precedent upon which it is based) may at first seem inconsistent with the fundamental principle that increasing the price of an activity (*i.e.*, broadcasting indecency) will decrease the quantity of that activity demanded in the market, or in the language of economics, that demand curves are downward sloping. *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 60-61 (12th Ed. 1985); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 5 (4th Ed. 1992). We would hardly undertake to doubt this basic principle, however. *See Smith v. NTSB*, 981 F.2d 1326, 1328 (D.C. Cir. 1993). Rather, our concern is with the magnitude of its effect in this particular case (*i.e.*, with the elasticity of demand for broadcast indecency).

Without some reason to believe that the level of broadcast indecency is significantly affected by the possibility of incurring an FCC sanction, we lack a sufficient basis for the exercise of the federal judicial power. A court is rightly reluctant to enter a judgment which may have no real consequence, depending upon the putative cost-benefit analyses of third parties over whom it has no jurisdiction and about whom it has almost no information.

III. CONCLUSION

This dispute between the petitioner and the FCC falls outside the constitutional domain of the federal courts. The petitioner fails to establish a justiciable case or controversy because his asserted injury is too attenuated and improbable and because this injury neither resulted from the challenged Government decision nor would be remedied by a reversal of that decision. Accordingly, the petition for review is

Dismissed.

United States Court of Appeals
For the District of Columbia Circuit

No. 91-1115 September Term, 1992

Peter Branton,
Petitioner

v.

Federal Communications Commission
and United States of America,
Respondents

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: Buckley, Williams and D. H. Ginsburg, Circuit Judges

J U D G M E N T

This cause came on to be heard on the petition for review of an order of the Federal Communications Commission and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petition for review is dismissed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: June 1, 1993
Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

[Filed June 1, 1993]

United States Court of Appeals
For the District of Columbia Circuit

No. 91-1115 September Term, 1992

Peter Branton,
Petitioner

v.

Federal Communications Commission
and United States of America
Respondents

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Intervenors' Suggestion For Rehearing *En Banc* and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /s/ Linda Jones for
Robert A. Bonner
Deputy Clerk

Chief Judge Mikva and Circuit Judges Wald and Edwards would grant the suggestion.

[Filed September 30, 1993]

United States Court of Appeals
For the District of Columbia Circuit

No. 91-1115 September Term, 1992

Peter Branton,
Petitioner

v.

Federal Communications Commission
and United States of America
Respondents

BEFORE: Buckley, Williams and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of intervenors' petition for rehearing, filed July 16, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Linda Jones for
Robert A. Bonner
Deputy Clerk

[Filed September 30, 1993]

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 24, 1991

Released: January 25, 1991

Mr. Peter Branton
1007 Scenic Highway
Lookout Mountain, TN 37350

8310-HTS
C11-515

Dear Mr. Branton:

This letter concerns your November 17, 1989, Petition for Reconsideration of the Mass Media Bureau's October 26, 1989, dismissal of your complaint against National Public Radio. That request is being treated as an Application for Review pursuant to Section 1.115 of the Commission's Rules, given your expressed desire for eventual full Commission review. Your complaint alleged that a segment about John Gotti, a reputed organized crime figure, broadcast February 8, 1989, at 6:25 p.m. on the National Public Radio program "All Things Considered," was indecent. Specifically, the recording you supplied included, as part of a news segment about organized crime, a wiretap of a telephone conversation in which Gotti repeatedly used variations of the expletive "fuck" (transcript attached). In your Petition, you claim that it is difficult to understand how the language in the broadcast can be considered less than in violation of any standards of "obscene or indecent material." You also state the broadcast contained a preliminary admission that the language is "extremely profane" and note that an "obscene word" was repeated numerous times in the broadcast.

"Indecent programming" is defined as programming "that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual

or excretory activities or organs." *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). When analyzing whether particular material meets this definition, the Commission looks first and foremost to the context in which the language was presented -- a review that encompasses a host of variables, including, among other things, an assessment of whether the language was used in a "shocking" or "vulgar" fashion or was without merit. *Id.* at 932. No terms are *per se* indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency if used in other, less objectionable circumstances. *Id.* at 932 and N.28, *see also* Letter from James C. McKinney to William J. Byrnes (June 5, 1987), *aff'd Memorandum Opinion and Order*, FCC 87-215 (June 16, 1987).

We recognize that the repetitious use of coarse words is objectionable to many persons, and understand that you personally may have been offended by the use of expletives during the Gotti segment. Nonetheless, we do not find the use of such words in a legitimate news report to have been gratuitous, pandering, titillating or otherwise "patently offensive," as that term is used in our indecency definition. In reaching this determination, we note that the program segment, when considered in context, was an integral part of a *bona fide* news story concerning organized crime, and that the material prompting your complaint was evidence used in a widely reported trial. *See Infinity Broadcasting*, 3 FCC Rcd. at n.31. These surrounding circumstances persuade us that the use of expletives during the Gotti segment does not meet our definition of broadcast indecency. In reaching this conclusion, we note that we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners. *See, e.g., Syracuse Peace Council*, 2 FCC Rcd. 5043, 5051 (1987), *recon. denied*, 3 FCC Rcd. 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 107 L. Ed. 2d 737 (1990).

Based on the foregoing, we affirm the Mass Media Bureau's conclusion that the material in question was not indecent. Accordingly, pursuant to Section 1.115 of the Commission's Rules, (47 C.F.R. Section 1.115) your Request for Reconsideration of the October 26, 1989, determination, which the Bureau has referred to the Commission to be treated as an Application for Review, IS DENIED.

This letter was adopted by the Commission on January 24, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

February 8, 1989, 6:25 p.m.
"All Things Considered" #890208 "GOTTI"

MV: Male Voice
MS: Mike Schuster
JG: John Gotti
OV: Other Voice

MV: He is known in New York as the dapper Don and the book published last year labeled him a Mob Star. John Gotti has become the nation's most notorious gangster. In recent years he's been acquitted in two celebrated trials and now he's facing new charges in connection with an attempted killing of a labor official. Through it all, John Gotti has become a familiar face on television and a feared presence on the streets of New York. NPR's Mike Schuster has a report and a warning, the following story contains some very rough language.

*****

MS: This is an excerpt from a wiretap. One conversation Gotti had with an associate some years ago before heading the Gambino family. The tape has been played in court. Gotti is browbeating the associate for not returning his phone calls. The other man claims his wife didn't pass along Gotti's messages. Gotti's threats are extremely profane.

JG: (Unintelligible) fucking (unintelligible) you understand me?

OV: (Unintelligible)

JG: Listen, I called your fucking house five times yesterday. Now if you want (unintelligible) fuck (unintelligible). Now if you want to disregard my fucking phone calls I'll blow you and the fucking house up.

OV: I never disregarded anything.

JG: Are you, call your fucking wife or will you tell her.

OV: All right.

JG: This is not a fucking game I (unintelligible) how to reach me days and nights here, my fucking time is valuable.

OV: I know that.

JG: Now you get your fucking ass (unintelligible) and see me tomorrow.

OV: I'm going to be here all day tomorrow.

JG: Never mind all day tomorrow (unintelligible) if I hear anybody else calling you (unintelligible) I'll fucking kill you.

MS: As head of the Gambino family, Gotti controlled vast crime activities including gambling, loan sharking, labor racketeering and gasoline bootlegging. Author Gene Mustane

says Gotti has worked hard during the past three years to consolidate his control and defend the mob from the onslaught of federal and state prosecutions that the Mafia suffered.

DISSENTING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Application for Review of Bureau's Dismissal of Indecency Complaint Filed Against National Public Radio's "All Things Considered".

Between 1975 and 1987, the Commission took a somewhat limited approach to enforcing its prohibition against indecent broadcasts. It took no action unless the material involved the repeated use, for shock value, of words similar or identical to the so-called "Seven Dirty Words" satirized in George Carlin's "Filthy Words" monologue -- a performance involved in the Supreme Court's *Pacifica* decision. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Four years ago, the Commission found that this standard was unduly narrow. It concluded that the definition of indecent material set forth in *Pacifica* appropriately includes a broader range of material than the seven specific words at issue in that case. As we noted in *Pacifica Foundation, Inc.*, 2 FCC Rcd. 2698, 2699 (1987), "[t]hose particular words are more correctly treated as examples of, rather than a definitive list of the kinds of words that, when used in a patently offensive manner as measured by contemporary community standards applicable for the broadcast medium, constitute indecency." The D.C. Circuit upheld this Commission action, finding that the FCC had "rationally determined that its former policy could yield anomalous, even arbitrary results." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988). In broadening its definition of indecency, however, the Commission never abandoned its earlier standard. The seven dirty words remained a key determination of what the Commission would find unacceptable. The Commission, by

its 1987 clarification, merely expanded the standard to include a wider range of indecent material.

In this case, however, it appears that the Commission is veering away from its former standard. Bending over backwards, perhaps -- because the broadcast in question was by National Public Radio, and because it was a newscast -- the Commission suddenly appears willing to ignore the standard that in the past has guided its decisions on indecency. One stark fact remains, however: the broadcast featured, in the course of a few seconds, ten repetitions of the dirtiest of "the seven dirty words". The word in question is the one expletive that has *traditionally* been considered the most objectionable, the most forbidden, and the most patently offensive to civilized and cultivated people: the famous F-word. That word, in the past -- and especially its deliberate, repeated, gratuitous use -- has almost always been sufficient to justify a ruling of indecency by the FCC.

Can its use in the NPR broadcast now before us be defended as necessary to inform the audience and to establish the character of John Gotti, the man who spoke it? Perhaps. Just one airing of the word, however, would be sufficient to accomplish that purpose. Although I recognize the importance of context to indecency determinations. I consider that the deliberate and repeated use of this word fits precisely the meaning of the word gratuitous: unnecessary and unwarranted. And such deliberate and repeated use, in my judgment, however noble the intent of the broadcaster, seems to me to fit the definition of pandering: catering to low tastes.

In the sensitive and controverted field of indecency enforcement, every Commission decision, however small or close, has precedential value. I am concerned that the Commission's departure here from its unusual standard, though well-intentioned, could open the floodgates to the repeated, gratuitous use of language that has historically and legally been considered indecent or obscene. By such decisions as this, the Commission may unwittingly encourage a plethora of

"newscasts" that purvey patently objectionable material under the cover of journalistic legitimacy. Such a development would not only be a misfortune for our national culture; it would also contravene the intentions of Congress and the courts, who have never suggested that broadcasters be given *carte blanche* to incorporate indecent material into news or public affairs programming.[1] Although the Commission has twice declined to adopt an express "news exemption" for indecency enforcement, it may have implicitly created such an exemption here.

The Supreme Court has held that government can constitutionally regulate indecent broadcasts in the interest of protecting children. I interpret that as including the protection of children form the gratuitous use of patently offensive language even in *bona fide* news stories. And so I dissent, in this case, from the Commission's decision that the broadcast in question was not indecent.

FOOTNOTE FOR STATEMENT

[1] *See Citizen's Complaint Against Pacifica Foundation*, 59 FCC 2d 892 (1976); *Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd. 930, 937 n.31 (1987).

(2)

Supreme Court, U.S.
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No. 93-1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PETER BRANTON,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS NATIONAL PUBLIC RADIO, PUBLIC BROADCASTING SERVICE, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that an individual does not have standing under Article III to seek judicial review of a Federal Communications Commission decision not to impose sanctions for allegedly "indecent" language in a radio news broadcast?

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BRIEF FOR RESPONDENTS NATIONAL PUBLIC RADIO, PUBLIC BROADCASTING SERVICE, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN OPPOSITION

This case presents the question whether a private individual has standing to obtain judicial review of a Federal Communications Commission decision not to sanction a broadcaster for an allegedly "indecent" program. As the Court of Appeals correctly concluded, because no imminent threat exists that such an individual will be exposed to "indecent" material on the same station in the future, the individual lacks standing to seek judicial review. That conclusion is consistent with this Court's precedents, and does not conflict with the decision of any other court of appeals.

This would have been a particularly inappropriate case in which to confer standing to challenge government action. Petitioner

does not claim that the Commission has deprived him of any benefit to which he might otherwise be entitled. He is, instead, merely seeking to have the Commission impose sanctions on third parties who five years ago produced and broadcast a radio news program that contained a supposedly "indecent" word. Moreover, petitioner has not claimed to be a regular listener of the station or the program that was the subject of his complaint. Nor has he asserted an interest as a parent in shielding a young child from "indecent" material. His claim to standing to challenge the Commission's action is plainly too insubstantial to warrant this Court's attention.

STATEMENT OF THE CASE

National Public Radio produces an acclaimed news magazine program, *All Things Considered*, which is broadcast on its member stations during the early evening hours. On February 8, 1989, *All Things Considered* presented a report on John Gotti, the leader of an organized crime family in New York. Pet. App. 2a, 15A. The Gotti report was prefaced by a warning that "the following story contains some very rough language." *Id.* at 17a.

The report opened by describing Gotti as "the nation's most notorious gangster" and noting his acquittal in two celebrated trials. Pet. App. 17a. The report included comments from the head of the Justice Department's Organized Crime Strike Force in Brooklyn, a detective in the Queens District Attorney's Office and the author of a book about Gotti.

The report concluded with an excerpt from a wiretap, which had previously been played in court, of a telephone conversation in which Gotti threatened one of his associates. Pet App. 18a-19a, A second warning that "Gotti's threats are extremely profane" preceded the wiretap excerpt. *Id.* at 18a. According to the Court of Appeals' calculations, "[i]n the 110-word passage that NPR excerpted from the tape recording for broadcast, Gotti used variations of 'the f--- word' ten times," including "to modify virtually every noun and in one instance even a verb." *Id.* at 2a.

Petitioner Peter Branton heard the Gotti report on WSMC-FM,

a Collegedale, Tennessee radio station, at approximately 6:25 p.m. on February 8, 1989. Pet. App. 15a. Three months later, he filed a complaint with the Commission's Mass Media Bureau, contending that the language in the wiretap was obscene and indecent under 18 U.S.C. § 1464 (1988).[1]

On October 26, 1989, the Mass Media Bureau dismissed Branton's complaint on the ground that the broadcast was neither obscene nor indecent. Pet. App. 15a. Branton sought review of the Mass Media Bureau's decision, in order to have the full Commission impose a forfeiture.[2]

On January 25, 1991, the Commission affirmed the Mass Media Bureau's conclusion that the Gotti report did not come within the Commission's definition of "indecency" -- *i.e.*, that the material did not "'describe[] in terms patently offensive as measured by contemporary community standards for the broadcast

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[1] The constitutional implications of the Commission's regulation of broadcast indecency under 18 U.S.C. § 1464 have previously been considered by this Court and the Court of Appeals. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281, 1282 (1992) ("*ACT II*"); *Action for Children's Television v. FCC*, No. 93-1082, (D.C. Cir. rehearing en banc granted Feb. 16, 1994) ("*ACT III*"). The Court of Appeals' post-*Pacifica* cases have upheld the Commission's "indecency" definition against vagueness and overbreadth challenges. At the same time, however, the court has held that the government is barred by the First Amendment from imposing a 24-hour-a-day ban on broadcasts that the Commission might deem "indecent." The precise scope of the safe harbor that must be provided for such material is currently being litigated.

[2] If the Commission finds that broadcast material is actionably indecent -- *i.e.*, that the material comes within its indecency definition and was broadcast outside any existing safe harbor period -- the Commission ordinarily imposes a monetary forfeiture. *See* 47 U.S.C. § 503(b) (1988). These forfeitures have ranged from several thousand dollars to several hundred thousand dollars in recent cases.

medium, sexual or excretory activities or organs.'" Pet. App. 15a-16a (quoting *Infinity Broadcasting Corp.*, 3 F.C.C.R. 930 (1987), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988)). The Commission emphasized the importance of "context" in its determinations of whether material is "indecent." Pet. App. 16a. The Commission then concluded that the "context" of the Gotti wiretap -- which was "an integral part of a *bona fide* news story concerning organized crime" and which itself "was evidence used in a widely reported trial" -- precluded a finding of indecency. *Id.* at 16a. One Commissioner dissented. *Id.* at 19a-21a.

Branton filed a petition for review of the Commission's decision in the Court of Appeals for the District of Columbia Circuit. The Court permitted these respondents to intervene in support of the Commission's decision.

These respondents explained to the Court of Appeals that the dismissal of Branton's complaint not only was consistent with the Commission's practice, but also was constitutionally compelled. First, these respondents joined the Commission in arguing that the Gotti report, including the wiretap conversation, was not "indecent" under the Commission's own definition, given the emphasis that the Commission places on "context" in its indecency determinations.[3] It was thus appropriate for the Commission to take into account the context of the wiretap conversation as "an integral part of a *bona fide* news story on organized crime," as presenting "evidence used in a widely reported trial," and as not involving the "gratuitous, pandering, titillating or otherwise 'patently offensive'" use of "coarse words." Pet. App. 16a.

In addition, these respondents argued that the Commission could not, consistent with the First Amendment, impose sanctions

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[3] Respondents noted, however, that the Commission's "indecency" definition is far from satisfactory. Indeed, these respondents, and others, have urged elsewhere that the definition is unconstitutionally vague. *See, e.g., ACT I*, 852 F.2d at 1338-39.

for "coarse words" used in an evening news program with no appreciable child audience.[4] As respondents explained, the First Amendment prevents the Commission from "intrud[ing] unnecessarily upon the editorial discretion of broadcasters," especially with respect to material, such as news and commentary on public issues, that "lies at the heart of First Amendment protection." *FCC v. League of Women Voters*, 468 U.S. 364, 379, 381 (1984); *accord CBS Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 123-25 (1973). Accordingly, while the Commission may regulate indecency to serve an important or "compelling" interest, such as assisting parents in supervising their children's viewing and listening, any indecency regulation that reached an evening news broadcast heard almost exclusively by adults would not be sufficiently "narrowly tailored" to pass constitutional muster. *League of Women Voters*, 468 U.S. at 380; *see Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989).[5]

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[4] Respondents pointed out that National Public Radio member stations attract no appreciable audience of children or teenagers for their evening programming. For example, the Commission had previously noted that "according to the Arbitron National Report (Spring 1989), member stations carrying NPR programming have *no* measurable audience in the [12-17] age group from . . . 6 p.m. to 6 a.m." *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 F.C.C.R. 5297, 5303 (1990), *vacated and remanded sub nom. ACT II*, 932 F.2d 1504. As the Commission observed, no data are routinely collected as to the listening habits of children under 12. 5 F.C.C.R. at 5302.

[5] Respondents noted the Court of Appeals' earlier holding that the Commission may regulate non-obscene "indecent" broadcasts only through "carefully-tailored regulation" that "give[s] effect to the government's interest in promoting parental supervision of children's listening, without intruding excessively upon the licensee's range of discretion or the fare available for mature audiences." *ACT I*, 852 F.2d at 1343 n.18, 1344 (R.B. Ginsburg, J.); *accord ACT II*, 932 F.2d at 1508-09.

On June 1, 1993, the Court of Appeals dismissed Branton's petition for review on Article III standing grounds. The court held that Branton could not establish the "'real and immediate threat of injury'" necessary to permit a litigant to challenge the government's decision not to regulate or prosecute others. Pet. App. 4a (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)). The court explained that, "[w]hile there is, of course, some chance that somewhere, at some time, the petitioner may again be exposed to a broadcast indecency as a result of the Commission's decision, that possibility seems to us far too remote and attenuated to establish a case or controversy under Article III." *Id.* at 6a. In addition, the court held that Branton likewise could not satisfy the "causation" and "redressability" requirements of Article III standing. *Id.* at 7a-10a.

On September 30, 1993, the Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc filed by two other intervenors in the case. Pet. App. 13a.

REASONS FOR DENYING THE PETITION

The Court of Appeals' conclusion that Branton cannot establish a "real and immediate threat of injury" sufficient to confer standing under Article III is correct under this Court's precedents. It does not conflict with any decision of this Court or of any other court of appeals.

1. The Court of Appeals' decision involves nothing more than an application of the standing requirements articulated in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), and *Los Angeles v. Lyons*, 461 U.S. 95 (1983), in the particular context of broadcast indecency regulation. Accordingly, review by this Court is not warranted.

This Court reiterated just two years ago that "the irreducible constitutional minimum of standing" requires, *inter alia*, that the plaintiff demonstrate an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Lujan*, 112 S. Ct. at 2136 (internal quotations omitted); *accord Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lyons*, 461 U.S. at 102. The Court

explained that such an injury becomes especially difficult to establish where, as in this case, *Lujan* and *Lyons*, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan*, 112 S. Ct. at 2137. It is not enough in these circumstances for the plaintiff to claim to have been injured by the "someone else" at some time in the past; instead, the plaintiff must demonstrate a "real and immediate threat of injury" in the future should the government continue to act in an allegedly unlawful manner. *Lyons*, 461 U.S. at 103; *accord Lujan*, 112 S. Ct. at 2138. And because "the acts necessary to make [such an] injury happen are at least partly within the plaintiff's own control" or in the control of third parties, the Court has "insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Lujan*, 112 S. Ct. at 2139 n.2.

Branton does not appear to dispute that he must establish some "injury in fact" in order to have standing to seek judicial review of the Commission's dismissal of his complaint. *See* Pet. 7, 14. He merely disputes the Court of Appeals' conclusion that he could not establish the requisite "real and immediate threat of injury" in the circumstances of this case. But the court below was surely correct that "[i]t is mere conjecture that a radio station will again broadcast, at a time when the petitioner is listening, indecencies that would be proscribed under 18 U.S.C. § 1464 (as he would have us interpret that statute)." Pet. App. 5a-6a. The Court of Appeals' case-specific application of the "injury in fact" requirement does not merit this Court's attention.[6]

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[6] As Branton acknowledges (Pet. 9 n.4), "agency standing and Article III standing need not be governed by the same test." Nothing in the Court of Appeals' decision prevents the Commission from continuing, as it does today, to receive and decide viewers' and listeners' indecency complaints in advance of a license-renewal proceeding. There is thus no reason to accept Branton's claim that a broadcaster who is the subject of a complaint will, as a result of the decision below, "get[] no intermediate relief, no warning, and no opportunity to conform its

That the Commission is required to regulate the airwaves in "the public interest" with due regard for "the right[s] of viewers and listeners" does not, as Branton contends (Pet. 9, 12), mean that viewers and listeners have standing to challenge any regulation (or non-regulation) of the airwaves with which they disagree. All criminal and regulatory statutes are, of course, designed to promote "the public interest." But that does not automatically confer standing on any member of the public to sue in federal court over the government's decision whether or not to enforce those statutes against third parties. It remains necessary to demonstrate some "real and immediate threat of injury" to the very party seeking to challenge the government's enforcement activity. *See Lujan*, 112 S. Ct. at 2137 ("'[T]he "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.'") (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)). The Court of Appeals correctly concluded that the "injury in fact" requirement was not satisfied here.[7]

The correctness of the Court of Appeals' conclusion is especially clear in the circumstances of this case. Branton has not claimed to be a regular listener of WSMC-FM, the station on which he heard the Gotti report, or of any other station that broadcasts National Public Radio programs. Indeed, he has not claimed to have been exposed to allegedly "indecent" speech on

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broadcasts to the FCC's rules except in a proceeding to grant or deny its license renewal." Pet. 17-18.

[7] Contrary to Branton's suggestion (Pet. 8-9), *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), had nothing to do with listener standing in the courts. It was the broadcaster who was the subject of the indecency complaint in *Pacifica* -- *not* the complaining listener -- who sought judicial review of the Commission's order sustaining the complaint. *See Pacifica Foundation v. FCC*, 556 F.2d 9, 10 (D.C. Cir. 1977). It was likewise the broadcaster who was the subject of the fairness complaint in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), who sought judicial review in the court of appeals and in this Court. *See id.* at 372-73 & n.3.

any radio station on any other occasion. Nor has Branton claimed an interest as a parent in deterring the presentation of "indecent" material on a program heard by his child.[8] An individual's standing to challenge the Commission's dismissal of an indecency complaint is particularly insubstantial where, as here, he is neither a regular listener of the station or program at issue nor a parent seeking the government's assistance in shielding his child from indecent material.[9]

2. The decision below does not conflict with the decision of any other court of appeals. Neither of the cases from other Circuits on which Branton purports to rely -- both of which

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[8] As the District of Columbia Circuit recognized in *ACT I*, the Commission's sole interest in regulating "indecent" broadcasts is to "facilitate parental supervision of children's listening." 852 F.2d at 1343; *accord ACT II*, 932 F.2d at 1508-09.

[9] These respondents take no position on the correctness of the Court of Appeals' conclusion that standing must also be denied based on the absence of "causation" and "redressability." Nor is it necessary for this Court to consider this alternative ground for decision, given that standing was correctly found wanting based on the absence of an "injury in fact."

These respondents do not, however, concur in all aspects of the lower court's "causation/redressability" analysis. For example, respondents disagree with the suggestion that broadcasters' programming decisions may not be affected by the threat of FCC indecency sanctions. Pet. App. 9a-10a. The court failed to appreciate the potentially dire consequences to a broadcaster of presenting material that the Commission may deem to be "indecent," which include not only substantial fines, but also denial of approval to acquire new stations and permanent loss of its license. Nor do respondents accept the court's suggestion that public broadcasters and program production organizations, such as National Public Radio, may be peculiarly indifferent to indecency sanctions. *Id.* at 9a. Public broadcasters, at least as much as commercial broadcasters, cannot afford to incur fines, to jeopardize their licenses or to offend their listeners and viewers. National Public Radio would not want to provide its member stations with programs that might cause such consequences.

predate *Lujan* -- concerned standing to appeal the dismissal of an indecency complaint. In fact, respondents are aware of no other reported case in any court in which the Commission's dismissal of such a complaint has been challenged.

The cases advanced by Branton instead involve challenges to other sorts of Commission actions that have more direct and immediate consequences for the viewer or listener. *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984), held that a listener could appeal the Commission's dismissal of a complaint under the then-extant fairness doctrine, which required broadcasters to present conflicting points of view on controversial issues. And *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975), ultimately concluded that an organization representing cable television viewers did *not* have standing to challenge the Commission's refusal to impose common carrier obligations on cable access channels.

The Commission's decisions in *Maier* and *ACLU* cannot be analogized for standing purposes to the Commission's dismissal of the indecency complaint in this case, because a viewer's or listener's injury as a result of adverse Commission action is quite different in these other contexts than in the indecency context. For example, if a broadcaster were found to have violated the now-repealed fairness doctrine, the Commission would have ordered the broadcaster to provide air time for the previously unrepresented viewpoint. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 660-61 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). A listener whose fairness complaint was dismissed would thus lose the opportunity to receive programming on that station presenting the opposing side of a controversial issue. That loss would arguably be "real and imminent" enough to satisfy the "injury in fact" component of Article III standing, as the District of Columbia Circuit's own decisions involving standing to pursue

fairness complaints implicitly recognize.[10]

A listener suffers no comparable loss, however, when the Commission dismisses his indecency complaint. If a broadcaster is found to have committed an indecency violation, the Commission may order a monetary forfeiture or other sanctions. But the Commission does not impose any prospective programming obligation on the broadcaster. Accordingly, when an indecency complaint is dismissed, the listener is not, as in the fairness context, deprived of any opportunity to receive particular programming. The Court of Appeals' decision that individuals do not have standing to challenge the Commission's dismissal of indecency complaints cannot, therefore, be said to conflict with other courts' decisions that individuals have standing to challenge different Commission actions that could cause them some "real and immediate" injury.

3. The expansive approach to viewer and listener standing urged by Branton could impose a new and undue burden on the Commission, broadcasters and the courts.

The Commission receives a number of indecency complaints each year that are ultimately dismissed. At times, the Commission has been deluged with such complaints as a result of the concerted efforts of advocacy groups. The volume of

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[10] For example, in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), the court held that viewers had standing to challenge the Commission's renewal of the license of a broadcaster who had failed to fairly present the black perspective on civil rights. The Commission's action thus deprived viewers of the imminent opportunity to receive the programming of a new licensee who could be expected to provide more extensive and balanced civil-rights coverage. Similarly, in *Llerandi v. FCC*, 863 F.2d 79 (D.C. Cir. 1988), listeners were recognized to have standing to challenge the Commission's approval of the transfer of two radio licenses to members of the same family -- an action that deprived listeners of the opportunity to obtain greater "diversification of viewpoints" on radio stations within a single broadcast area. *Id.* at 85.

indecency complaints might well increase if complainants were assured of a judicial forum in which to press their causes. A significant strain would be placed on the time and resources of the Commission, broadcasters and the courts if judicial review were sought in even a portion of the indecency cases dismissed by the Commission.

It cannot be assumed that these cases would proceed through the courts any more expeditiously or economically than this case, which was pending in the Court of Appeals for nearly three years and which demanded considerable attention from the court and the parties. These cases would be complicated by the fact that, as the Court of Appeals has recognized, "vagueness is inherent" in the Commission's definition of broadcast indecency. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (R.B. Ginsburg, J.) ("*ACT I*"). And the safe harbor hours for the broadcast of material that the Commission might deem "indecent" have changed frequently in recent years as a result of congressional and Commission action. *See Action for Children's Television v. FCC*, No. 93-1082, (D.C. Cir. rehearing en banc granted Feb. 16, 1994); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281, 1282 (1992); *ACT I*, 852 F.2d 1332. The courts would thus face the difficult task of assessing the Commission's compliance with standards that are both obscure and constantly shifting.

The standing rule urged by Branton would also produce the anomaly that, while viewers and listeners could seek immediate judicial review of Commission orders *dismissing* indecency complaints, broadcasters could not similarly seek judicial review of Commission orders *sustaining* indecency complaints. A Commission order imposing indecency sanctions cannot be immediately challenged by the broadcaster in the district courts or the courts of appeals, but may be challenged only when the United States eventually commences a collection action. *See* 47 U.S.C. § 504(a) (1988); *Pleasant Broadcasting Co. v. FCC*, 564

F.2d 496, 501-03 (D.C. Cir. 1977).[11] It would turn standing doctrine on its head to afford viewers and listeners, who face no "real and immediate threat of injury" from adverse Commission action dismissing an indecency complaint,[12] a greater right to judicial review than broadcasters, who plainly do face such a threat from adverse Commission action imposing monetary forfeitures or other sanctions for "indecent" programming.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[11] *See also Action for Children's Television v. FCC*, 827 F. Supp. 4, 7-8 (D.D.C. 1993) (recognizing that immediate review is unavailable), *appeal pending*, No. 93-5278 (D.C. Cir.).

[12] Congress has not, of course, enacted legislation under 18 U.S.C. § 1464 purporting to "elevat[e]" the dismissal of viewers' and listeners' indecency complaints "to the status of legally cognizable injuries." *Lujan*, 112 S. Ct. at 2145.

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No. 93-1047

In the Supreme Court of the United States

OCTOBER TERM, 1993

PETER BRANTON, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a listener who lodges a complaint with the Federal Communications Commission alleging that a broadcaster violated the indecency prohibition in 18 U.S.C. 1464 has standing to seek judicial review of the agency's determination that the broadcaster did not violate that statute.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 993 F.2d 906. The ruling of the Federal Communications Commission (Pet. App. 15a-21a) is reported at 6 F.C.C. Rcd. 610.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1993. Pet. App. 12a. The order of the court of appeals denying rehearing was entered on September 30, 1993. Pet. App. 14a. The petition for a writ of certiorari was filed on December 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has prohibited the broadcast of obscene or indecent language over the public airwaves under 18 U.S.C. 1464. The Federal Communications Commission (FCC) has express statutory authority to impose various sanctions for the violation of Section 1464, including license revocation (47 U.S.C. 312(a)(6)) and forfeiture penalties (47 U.S.C. 503(b)(1)(D) and (2)). See *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 735-738 (1978). In exercising its authority to enforce Section 1464, the FCC has defined "indecency" as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience." *Infinity Broadcasting Corp.*, 3 F.C.C. Rcd. 930, 930 (1987), aff'd in part *sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The Commission has also explained that the context of a broadcast is essential to an indecency determination, and that material broadcast in "the context of a *bona fide* news program" would likely be of less concern than other types of programming. 3 F.C.C. Rcd. at 937 n.31.

On February 8, 1989, petitioner heard a news report concerning alleged organized crime leader John Gotti on the National Public Radio (NPR) news program, "All Things Considered." The report included an excerpt of a wiretapped telephone conversation that had been introduced at Gotti's trial. During the parts of the conversation aired on NPR, Gotti "used variations of 'the f—- word' ten times." Pet. App. 2a. Prior to the broadcast, NPR advised listeners that "the following story contains some very rough language." *Id.* at 17a. It did not, however, delete or mask the expletives, and petitioner

filed a complaint concerning that broadcast with the Mass Media Bureau of the FCC. *Id.* at 2a-3a.

The Mass Media Bureau dismissed petitioner's complaint, ruling that NPR's broadcast was not indecent and provided no basis for Commission action under Section 1464. Pet. App. 3a. Petitioner sent a letter to the Commission asking how he could appeal that decision. Treating his letter as an application for review, the Commission affirmed the Bureau's decision in a letter ruling. *Id.* at 15a-19a. Over one Commissioner's dissent, the FCC concluded that the program at issue was not indecent because the expletives were broadcast in the context of a *bona fide* news story relating to organized crime. *Id.* at 16a. The Commission emphasized that NPR's use of the expletives "in a legitimate news report" was not "gratuitous, pandering, titillating or otherwise 'patently offensive,' as that term is used in our indecency definition." *Ibid.* The Commission noted that the material prompting petitioner's complaint "was evidence used in a widely reported trial," and that the FCC "traditionally ha[s] been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners." *Ibid.*

2. Petitioner sought judicial review of the Commission's ruling. The court of appeals dismissed the petition for review *sua sponte* on the ground that petitioner lacked standing. Pet. App. 1a-11a. The court reasoned that petitioner was seeking to impose sanctions on NPR as a means of influencing the conduct of broadcasters prospectively, and that he lacked standing because "[i]t is mere conjecture that a radio station will again broadcast, at a time when * * * petitioner is listening, indecencies that would be proscribed under 18 U.S.C. § 1464 (as he would have us interpret that statute)." *Id.* at 5a-6a.

The court also found it "conjectural whether the FCC's proceeding against the alleged broadcast indecency of February [8], 1989 would cause any radio station(s) in * * * petitioner's area to broadcast any fewer indecent programs in the future." *Id.* at 9a. In the court's view, "radio stations might well decide that the benefits of broadcasting indecent language of the sort petitioner here challenges outweigh the costs of making certain payments to the Government (here in the form of fines rather than of taxes)." *Ibid.*

3. Two intervenors petitioned for rehearing, and the court of appeals ordered the parties to respond. In its response to the petition, the government argued that the court should grant rehearing en banc and reconsider the panel's ruling that petitioner lacked standing. On September 30, 1993, the panel denied the petition for rehearing, and the en banc court denied the suggestion for rehearing en banc, with three judges dissenting. Pet. App. 13a, 14a.

ARGUMENT

1. It is well settled that viewers and listeners have standing in various circumstances to sue the FCC to challenge broadcasters' noncompliance with requirements of the Communications Act of 1934 and the FCC's implementing regulations. See, *e.g.*, *Llerandi* v. *FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988); *Maier* v. *FCC*, 735 F.2d 220, 227-230 (7th Cir. 1984); *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1000-1006 (D.C. Cir. 1966) (Burger, J.); *Hale* v. *FCC*, 425 F.2d 556, 558 n.2 (D.C. Cir. 1970) (per curiam).

That recognition of viewer and listener standing arises from the special circumstances surrounding broadcast regulation. As this Court has explained, "the radio spectrum simply is not large enough to accommo-

date everybody," and "[r]egulation of radio was therefore as vital to its development as traffic control was to the development of the automobile." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 213 (1943). For that reason, Congress charged the FCC with "allocat[ing] frequencies among competing applicants in a manner responsive to the public 'convenience, interest, or necessity.'" *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 377 (1969); see 47 U.S.C. 307(a) (directing FCC to grant broadcast licenses "if public convenience, interest, or necessity will be served thereby"); see also, *e.g.*, *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). And the central purpose of broadcast licensing is to "protect the public" (*Sanders Bros.*, 309 U.S. at 475), whose rights as viewers and listeners have been deemed "paramount" in the scheme of broadcast regulation. *Red Lion*, 395 U.S. at 390.[1]

This Court has recognized that in enacting the Communications Act of 1934, Congress applied those principles in making judicial remedies broadly available to members of the public for whose benefit Congress enacted the statute. In *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942), the Court emphasized that "[t]he purpose of the Act was to protect the public interest in communications," and that to that end, Congress gave persons "aggrieved or whose interests are adversely affected" by Commission action the right to appeal such

[1] To ensure that broadcast licenses are operated in the public interest, Congress has refused to recognize any property interest in such licenses. Instead, licenses have a limited duration, and they "may be revoked, and need not be renewed." *Sanders Bros.*, 309 U.S. at 475. Thus, the channels "presently occupied remain free for a new assignment to another licensee in the interest of the listening public." *Ibid.*

action. *Id.* at 14 (quoting Act of June 19, 1934, ch. 652, § 402(b)(2), 48 Stat. 1093).[2] The Court also made clear that Congress gave "these private litigants * * * standing only as representatives of the public interest." *Scripps-Howard Radio*, 316 U.S. at 14; see also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 136-137 (1973) (Stewart, J., concurring) ("the public interest in broadcasting has been recognized as a rationale for liberalized standing on the part of listener groups in Commission licensing proceedings").[3]

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[2] Congress authorized judicial review in the D.C. Circuit by any person "who is aggrieved or whose interests are adversely affected" by the grant or denial of applications for broadcast licenses or permits, for the renewal or modification of such instruments, or for their transfer, assignment, or other disposition. 47 U.S.C. 402(b)(6); see also 47 U.S.C. 402(b)(1)-(4). In 47 U.S.C. 402(a)—the provision under which review was sought in this case—Congress authorized judicial review of any Commission order through the Hobbs Act, 28 U.S.C. 2344, which allows "[a]ny party aggrieved by [a] final order" to file a petition for review in "the court of appeals wherein venue lies." Although the petition for review in this case was filed under Section 402(a), rather than Section 402(b), that distinction does not affect the availability of the judicial remedy afforded by Congress. Sections 402(a) and 402(b) "route appeals to different courts," but "the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform." *Scripps-Howard Radio*, 316 U.S. at 15; see *id.* at 16 ("As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commission's order arose out of a proceeding not instituted by the licensee.").

[3] That liberalized standing is consistent with Article III. In *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), this Court, in light of a broad congressional conferral of standing (*id.* at

Based on those considerations, the D.C. Circuit in *Office of Communication of United Church of Christ* v. *FCC* (*UCC*), *supra*, found that viewers had standing to challenge the renewal of a license on the ground that the licensee "provided a disproportionate amount of commercials and entertainment and did not give a fair and balanced presentation of controversial issues." 359 F.2d at 998.[4] The court emphasized that "a broadcast license is a public trust subject to termination for breach of duty," and that Congress assigned the public an important role in seeing that licensees exercise their publicly conferred authority consistently with the requirements of the Act. *Id.* at 1003. That principle has been applied in a number of contexts by the D.C. Circuit and other courts of appeals. See, *e.g.*, *Llerandi*, 863 F.2d at 85 (listener has standing to challenge assignment of two AM licenses in overlapping service area to one owner, in violation of FCC rules); *Maier* v. *FCC*, 735 F.2d at 227-230 (listener

96-97), held that individuals could bring suit against a realtor engaged in racially discriminatory practices, in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, even though the individuals were "testers" who did not actually wish to purchase homes. Because the testers were residents of the neighborhood in which the alleged unlawful practices occurred, the Court found that they had been injured as homeowners in the community. 441 U.S. at 111-115. By the same token, those who live in a licensee's community and listen to the licensee's programming may be injured by its noncompliance with the FCC's programming requirements.

[4] The FCC's "fairness doctrine" required broadcasters "to provide adequate coverage of public issues and to ensure that this coverage fairly and accurately reflect[ed] the opposing views." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984). The Commission has subsequently eliminated that doctrine. See *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

has standing to challenge violation of fairness doctrine and personal attack rule); see also *id.* at 223 (citing cases in which courts of appeals found listener or viewer standing without discussion).

2. Although the court of appeals in this case held that petitioner, a listener of NPR, lacked standing to challenge the Commission's dismissal of his indecency complaint, the court's narrowly based ruling does not merit this Court's review. The court of appeals did not question either petitioner's standing to seek relief from the Commission or the continuing availability of viewer or listener standing to seek judicial review under established precedent in the court's own circuit. (In fact, the court acknowledged the vitality of, and explicitly sought to distinguish, its prior decision in *UCC*, *supra*. Pet. App. 6a-7a.) Instead, the court merely held that on the facts of this case, petitioner did not have standing to contest the FCC's dismissal of his complaint because it was unclear whether the particular and isolated injury he alleged would again be visited upon him. *Id.* at 5a-7a.[5] The

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[5] The court of appeals rested (Pet. App. 4a-7a) its decision on this Court's decisions holding that to establish standing, a plaintiff must allege an immediate and concrete injury and may not seek prospective relief when it is speculative whether the injury complained of will ever be repeated. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Rizzo* v. *Goode*, 423 U.S. 362 (1976). For example, in *City of Los Angeles* v. *Lyons*, upon which the court of appeals principally relied (Pet. App. 4a-5a), this Court held that an individual who was placed in an allegedly unlawful chokehold during a traffic stop lacked standing to enjoin police from using such chokeholds in the future. 461 U.S. at 105-110. The Court explained that Lyons' past injury, "while presumably affording [him] standing to claim damages * * *, does nothing to establish a real and immediate threat that he would again be stopped * * * by an officer or officers who

court of appeals also held that it was unclear whether the alleged injury would be redressed by the sanctions that the Commission, in its discretion, might impose if there were a favorable disposition of the complaint.[6]

The court of appeals made those determinations without briefing or argument, and the government contested the court's standing determination in its response to the intervenors' petition for rehearing. See Gov't C.A. Resp. 2-7. We continue to believe that the court of appeals' analysis was flawed; indeed, we note that even NPR does not agree with all aspects of the court's analysis. See NPR *et al.* Br. in Opp. 9 n.9. Nevertheless, we believe that this case does not present an appropriate vehicle for this Court to consider the D.C. Circuit's approach to listener standing.

Because the record below does not indicate whether and to what extent petitioner was a repeat listener of

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would illegally choke him into unconsciousness without any provocation or resistance on his part." *Id.* at 105.

[6] The court of appeals cited (Pet. App. 7a-9a) this Court's precedents holding that individuals lacked standing to contest the decisions of executive officials not to impose costs or penalties on third parties. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737 (1984); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) (*EKWRO*). For example, in *Linda R. S.*, the Court found it speculative that the plaintiff's requested relief—the prosecution of someone alleged to be delinquent in child support payments—would result in the payment of support. 410 U.S. at 618; see also *EKWRO*, 426 U.S. at 42-43 (finding it speculative that denial of a tax exemption to hospitals providing insufficient free medical care would increase the availability of such care); *Allen* v. *Wright*, 468 U.S. at 758-759 (finding it speculative that withdrawal of tax exemption to racially discriminatory private schools would change schools' exclusionary policies). In those cases, the Court found that the requested relief would not redress the injury alleged.

stations carrying NPR, it does not provide a well developed factual setting for evaluating the court of appeals' application of this Court's injury-in-fact cases to the context of viewer and listener standing. Moreover, because petitioner's complaint did not specify what sanctions he sought from the FCC,[7] the record in this case does not present a firm basis for evaluating the redressability of his alleged injury. Indeed, it is far from clear that the D.C. Circuit would reject a complaint such as petitioner's seeking certain forms of relief. For example, among the remedies that the FCC may prescribe for a violation of 18 U.S.C. 1464 is license revocation. See 47 U.S.C. 312(a)(6). Like nonrenewal, license revocation is an "inherently future oriented" (Pet. App. 7a) remedy that examines whether the particular licensee should be exercising the public trust conferred by the license. Under the court of appeals' reasoning (*ibid.*), it would appear that a complaint requesting license revocation would be cognizable under the court's reading of *UCC*. Because of the imprecise nature of the relief requested by petitioner's complaint (and because the court of appeals only considered potential fines), it is difficult to evaluate the scope of the D.C. Circuit's ruling and its implications for future Section 1464 cases.[8] We therefore

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[7] Petitioner's May 18, 1989, complaint to the Mass Media Bureau merely stated that "NPR SHOULD BE REQUIRED TO MAINTAIN A POSITION OF CONTROL IN PROTECTING THEIR PROGRAMS FROM POSSIBLY INDECENT AND OBSCENE MATERIAL." App., *infra*, 2a.

[8] Indeed, in his November 17, 1989, letter seeking review of the Mass Media Bureau's decision to dismiss his complaint, petitioner emphasized that "MY COMPLAINT IS NOT AGAINST RADIO STATION WSMC-FM, COLLEGEDALE, TN BUT IS AGAINST NATIONAL PUBLIC RADIO THE ORIGINATOR OF THE PROGRAM IN QUESTION." App., *infra*, 3a. Because Section

believe that the ruling below requires further development by the lower courts before this Court's review is warranted.

3. Finally, contrary to petitioner's argument (Pet. 10-12), there is no conflict among the circuits warranting this Court's review. Petitioner argues that the decision below conflicts with the D.C. Circuit's decisions in *UCC* and its progeny. As discussed, however, the court of appeals expressly distinguished *UCC* on the ground that the appellant there had alleged a "pattern" of licensee misconduct in the context of a license renewal proceeding, which is "inherently future oriented." Pet. App. 6a, 7a. In contrast, the record in this case does not clearly disclose either the extent of petitioner's potential exposure to the alleged injury or the precise remedy sought. In any case, petitioner's allegation of an intra-circuit conflict does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).[9]

312(a)(6) provides for revocation of "any station license," it appears that petitioner would not have been able to seek license revocation under his complaint. It is unclear whether the court of appeals' ruling would have been different if petitioner had proceeded against the station, rather than the program originator. This case therefore presents no occasion for determining whether a complainant would have standing in a proceeding against a broadcast station, which would face license renewal and revocation proceedings.

In addition, before the FCC may impose forfeiture liability (*i.e.*, a fine) on a person who does not have a "license, permit, certificate, or other authorization" issued by the FCC, the Commission must give that person a warning. 47 U.S.C. 503(b)(5). Thus, it is unclear whether the FCC would have the discretion to impose a fine on NPR in this case.

[9] Petitioner also relies (Pet. 12) on *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397 (D.C. Cir. 1974). There,

Nor is the decision below inconsistent with the Seventh Circuit's decision in *Maier* v. *FCC*, *supra*. There, the court held that the mayor of Milwaukee had standing to challenge the Commission's decision that a broadcaster had not violated the fairness doctrine and the personal attack rule. In contrast with this case, the complainant in *Maier* sought to remedy the alleged retrospective violation of his statutory rights by seeking specific and affirmative relief of "at least one-half hour free air time of his own choosing on each of WTMJ's broadcast outlets." 735 F.2d at 223. Nothing in the D.C. Circuit's opinion suggests that it would find that standing did not exist in similar circumstances.

The Ninth Circuit's decision in *ACLU* v. *FCC*, 523 F.2d 1344 (1975), also presents no conflict with the decision in this case. In *ACLU*, the court recognized viewer and listener standing in conformity with the D.C. Circuit's decision in *UCC*. See *ACLU*, 523 F.2d at 1347. The ACLU was challenging aspects of the Commission's cable regulations,[10] arguing that they did not fulfill the

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the court of appeals allowed members of the listening public to intervene to challenge the FCC's decision to impose fines on a radio station for violating Section 1464. The radio station did not itself appeal, and the court found that listeners had standing on the basis that "the Commission must pay careful attention to ensure that the freedom of substantial numbers of the listening public is not curtailed because of possible offensiveness to particularly sensitive listeners." 515 F.2d at 406. Whatever the merits of petitioner's standing in this case, he possesses no First Amendment interest similar to the one supporting standing in *Illinois Citizens Committee for Broadcasting*. In any case, any tension between that decision and the decision below is for the D.C. Circuit to resolve.

[10] Specifically, the ACLU challenged the Commission's failure to impose common carrier obligations on cable access channels and to limit cablecasting by cable operators. 523 F.2d at 1346.

asserted requirement of the Communications Act to maximize sources of programming. At the outset, the court in *ACLU* held that "[i]f ACLU's claim is meritorious, standing exists; if not, standing not only fails but also ceases to be relevant." *Id.* at 1348. Significantly, the court went on to find the ACLU's claim unmeritorious. *Id.* at 1350-1351. In any event, the ACLU there sought an affirmative remedy requiring the FCC to fulfill its alleged obligation to ensure the availability of a diverse array of programming; that case did not involve a complaint by someone seeking to avoid exposure to certain programming.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM E. KENNARD
General Counsel
Federal Communications Commission

APRIL 1994

APPENDIX A

PETER BRANTON
1007 SCENIC HIGHWAY
LOOKOUT MTN, TN 37350

18 MAY '89

FEDERAL COMMUNICATIONS COMMISSION
MASS MEDIA BUREAU
ENFORCEMENT DIVISION
COMPLAINTS AND INVESTIGATION BRANCH
1919 M STREET
WASHINGTON, DC 20554

DEAR SIRS,

THIS IS IN FURTHER REFERENCE TO MY LETTER OF 10 FEB 1989 TO UNITED STATES SENATOR ALBERT GORE, JR AND MR ALEX D. FELKER'S REPLY TO SENATOR GORE.

MY COMPLAINT IS REGARDING A NATIONAL PUBLIC RADIO BROADCAST OF 8 FEB 1989 AND CARRIED IN THIS AREA BY RADIO STATION WSMC, COLLEGDALE [*SIC*], TN. A PART OF THE PROGRAM "ALL THINGS CONSIDERED" CONTAINS A TRANSCRIPT OF A TELEPHONE CONVERSATION BY A PERSON IDENTIFIED AS "MR JOHN GOTTI", AND A TAPE OF THIS PORTION IS ENCLOSED.

MR FELKER'S LETTER OUTLINES A "THREE-PRONG TEST" FOR OBSCENE MATERIAL AND I FEEL THAT IT REQUIRES VERY LITTLE IMAGINATION TO SEE THAT THIS BROADCAST WILL

PASS ALL SEGMENTS OF THE TEST WITH FLYING COLORS. FURTHERMORE, THE ENCLOSED TAPE OF THIS BROADCAST CONTAINS THE PRELIMARY [*SIC*] ADMISSION THAT THE LANGUAGE IS "EXTREMELY PROFANE" AND CERTAINLY THE LANGUAGE IS SUCH AS DESCRIBED BY MR FELKER AS "INDECENCY" PER THE DEFINATION [*SIC*] OF THE COMMISSION.

PERSONS FROM RADIO STATION WSMC HAVE ADVISED ME THAT A "DAX" WARNING FROM NPR WAS ISSUED CONCERNING THIS PROGRAM, BUT WAS INADVERTENTLY IGNORED, MUCH TO THE EMBARRASSMENT OF THE STATION. THIS INCIDENT EMPHASES [*SIC*] THAT A WARNING OF THIS TYPE IS NOT SUFFICIENT PROTECTION AND RAISES THE PRIMARY QUESTION OF THE ADVISABILITY AND NECESSITY OF ORIGINATING A BROADCAST CONTAINING SUCH INDECENT AND OBSCENE MATERIAL.

I FEEL THAT I AM NOT ALONE IN MY DEEP CONCERN REGARDING THE DETERIORATION OF MORAL STANDARDS IN OUR GREAT COUNTRY AND I FEEL THAT NPR SHOULD BE REQUIRED TO MAINTAIN A POSITION OF CONTROL IN PROTECTING THEIR PROGRAMS FROM POSSIBLY INDECENT AND OBSCENE MATERIAL.

YOURS TRULY,

/s/ Peter Branton
PETER BRANTON

CC: SENATOR ALBERT GORE, JR
MR ALEX D. FELKER
RADIO STATION WSMC
NATIONAL PUBLIC RADIO

APPENDIX B

PETER BRANTON
1007 SCENIC HIGHWAY
LOOKOUT MTN., TN 37350

17 NOV '89

MS EDYTHE WISE, CHIEF
COMPLAINTS & INVESTIGATIONS BRANCH
ENFORCEMENT DIVISION
MASS MEDIA BUREAU
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

DEAR MS WISE,

THANK YOU FOR YOUR LETTER OF OCT 26, 1989 (COPY ATTACHED).

FIRST I WOULD LIKE TO MAKE IT CLEAR THAT MY COMPLAINT IS NOT AGAINST RADIO STATION WSMC-FM, COLLEGEDALE, TN BUT IS AGAINST NATIONAL PUBLIC RADIO THE ORIGINATOR OF THE PROGRAM IN QUESTION.

SECOND, I FIND IT DIFFICULT TO UNDERSTAND HOW YOU COULD POSSIBLY FEEL THAT THE LANGUAGE IN THIS BROADCAST OF 8 FEB 1989 TO BE LESS THAN IN VIOLATION OF ANY STANDARDS OF "OBSCENE OR INDECENT MATERIAL". IF, IN FACT, THIS IS DEEMED TO BE ACCEPTABLE, I FIND IT HARD TO IMAGINE WHAT WORDS OF OUR LANGUAGE COULD BE CONSIDERED "ACTIONABLY INDECENT". IF IT MAKES ANY DIFFERENCE, I REMIND YOU THAT

THE BROADCAST CONTAINED A PRELIMARY [*SIC*] ADMISSION THAT THE LANGUAGE IS "EXTREMELY PROFANE" AND I FURTHER NOTE THAT THE WORD THAT WAS REPEATED NUMEROUS TIMES IN THE BROADCAST IS IDENTIFIED AS "OBSCENE" IN THE AMERICAN HERITAGE DICTIONARY", PUBLISHED BY HOUGHTON MIFFLIN CO, BOSTON. I ALSO REFER YOU TO THE ATTACHED LETTER OF 4 APRIL, 1989 TO SENATOR ALBERT GORE FROM ALEX D. FELKER, CHIEF, MASS MEDIA BUREAU, IN WHICH MR FELKER STATES, "HOWEVER, WE CAN, AND WILL, TAKE ACTION AGAINST THE BROADCAST OF OBSCENE OR INDECENT MATERIAL".

IF YOUR DECISION, AS STATED IN YOUR LETTER OF 26 OCT, REMAINS UNCHANGED, PLEASE ADVISE IF IT [*SIC*] IS ANY PROCEDURE OF APPEAL THAT I MAY FOLLOW. YOUR REPLY WILL BE APPRECIATED.

YOUR VERY TRULY,
/s/ Peter Branton
PETER BRANTON

CC MR ALEX D. FELKER
SENATOR ALBERT GORE, JR

Supreme Court, U.S.
FILED
APR - 6 1994
OFFICE OF THE CLERK

No. 93-1047

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PETER BRANTON,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS PEOPLE FOR THE AMERICAN WAY AND WASHINGTON AREA CITIZENS COALITION INTERESTED IN VIEWERS' CONSTITUTIONAL RIGHTS IN RESPONSE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS PEOPLE FOR THE AMERICAN WAY AND WASHINGTON AREA CITIZENS COALITION INTERESTED IN VIEWERS' CONSTITUTIONAL RIGHTS IN RESPONSE

This case comes before the Court in an unusual posture. Respondents People for the American Way and Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights ("PFAW/WACCI-VCR"), who oppose Petitioner on the merits of his indecency complaint, nevertheless ask this Court to grant the pending petition for a writ of *certiorari* because of the dangerous precedent set by the lower court's *sua sponte* misapplication of standing doctrine in this case. In denying standing to Petitioner without input from any litigant, the lower court created a clear conflict with well established precedent related to listener standing in FCC cases and with rulings of this Court. The lower court's decision has potentially widespread, adverse ramifications for the

public, broadcasters, and the FCC, which relies on listeners as private attorneys general in enforcing its regulations.

STATEMENT OF THE CASE

This case concerns the efforts of Petitioner Peter Branton to seek review of the FCC's denial of his complaint alleging that National Public Radio ("NPR") broadcast indecent material during its early evening news program "All Things Considered" in violation of 18 U.S.C. §1464. The FCC's Mass Media Bureau adjudicated Petitioner's complaint on the merits, finding that the broadcast material identified was "not actionably indecent." *Letter from Edythe Wise, Chief, Complaints and Investigations Branch, FCC Mass Media Bureau, to Peter Branton* dated October 26, 1989. Petitioner's letter inquiring about procedures for appeal was accepted by the full Commission as an Application for Review, and was denied on the ground that the broadcast material, contained in a "*bona fide* news story," was not "gratuitous, pandering, titillating or otherwise 'patently offensive'" and thus did not violate the FCC's indecency standard. *Petition for Writ of Certiorari* at 16a-17a. Petitioner sought review of the adverse adjudication in the United States Court of Appeals for the D.C. Circuit under Section 402 of the Communications Act, 47 U.S.C. §402, which provides "an explicit right of review to all persons adversely affected or aggrieved by particular [FCC] actions." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 394 n.8 (1987).

On review by a panel of the D.C. Circuit, neither the federal Respondents nor any of the Intervenors challenged Petitioner's standing to contest the FCC's decision on the merits.[1] At the court's request, the parties submitted post-argument supplemental briefs concerning the relevance of *Heckler v. Chaney*, 470 U.S. 821 (1985) to this case. In their briefs, all the litigants agreed

---

[1]PFAW/WACCI-VCR intervened before the D.C. Circuit to support affirmance of the FCC's decision because of their members' interest in protecting the First Amendment right of adults to hear news and other broadcast programming free of government censorship.

that the FCC's decision was reviewable under *Heckler v. Chaney*, primarily because the FCC had adjudicated the complaint on the merits rather than exercising its discretion not to decide the complaint. The court of appeals' opinion contains no reference to this issue.

Notwithstanding the absence of any prior mention of standing in this litigation, the panel, per D.H. Ginsburg, J., concluded *sua sponte* that Petitioner lacked standing. Construing the alleged injury to be personal to Petitioner, the panel ruled that a "past injury cannot establish the standing of a complainant...who seeks neither damages nor other relief for that harm," and that Petitioner had failed to demonstrate that his injury could be redressed by FCC action because "it is speculative" whether such action would prevent radio broadcasters from broadcasting indecency in the future. *Branton v. FCC*, 993 F.2d 906, 909, 911 (D.C. Cir. 1993).

Despite their opposition to Petitioner on the merits, PFAW/WACCI-VCR filed a petition for rehearing and suggestion for rehearing *en banc*, because of the serious adverse precedential impact of the panel's decision. Respondents FCC and the United States supported the petition, explaining that the court had "erred in its conclusion that petitioner lacked standing," that the panel's decision was "inconsistent with the approach to viewer/listener standing that this Court and the FCC have followed," and that the panel's reasoning on the causation/redressability prong contradicted the FCC's conclusion that "enforcement will deter future violations." *Response to Petition for Rehearing* (Aug. 31, 1993) ("FCC and U.S. Response to Petition for Rehearing"), at 1-3, 7. Nevertheless, the court denied the petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

This case presents the extremely rare situation where none of the litigants raised the issue of standing below and the government agency affected has agreed that there is standing, and yet the lower court reached a contrary conclusion, *sua sponte*, on the basis of standards which contravene established FCC-related law

and the dictates of this Court. Because the lower court's decision conflicts with all prior jurisprudence on listener standing in FCC actions as well as precedent in this Court, and because this decision will have a significant adverse impact on the public interest, Respondents PFAW/WACCI-VCR support the petition for a writ of certiorari. Specifically, the writ should be granted for the following reasons:

1. *The panel's decision conflicts with all prior court decisions on listener standing in FCC actions.* Following the D.C. Circuit's landmark decision in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("*UCC I*"), the FCC has afforded viewers and listeners standing "to seek judicial review of FCC actions involving a statute, rule or policy of which viewers or listeners are the obvious beneficiaries." FCC and U.S. Response to Petition for Rehearing, at 3.[2] As the FCC argued below, prior to the lower court's decision in this case, "no one has argued -- and no court has even suggested -- that the 'immediacy' element of constitutional standing analysis, as applied to a viewer/listener's challenge to FCC rejection of an argument related to broadcast programming, required anything more than that the viewer/listener reside within the service area of the station at issue." *Id.*

This Court has long recognized the foundation for listener standing, ruling that under Section 402 of the Communications Act of 1934 ("the Act"), Congress conferred standing on private litigants to appeal adverse FCC actions, but "only as representatives of the public interest." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942) (internal citation omitted). This Court further stated that courts, no less than administrative agencies, have broad power to vindicate this public interest. *Id.* at 14-15.

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[2]As Petitioner noted, while the standards for agency standing and Article III may differ, the courts and the FCC have applied the same Article III analysis. *See UCC I*, 359 F.2d at 1000, n.8. Under the same Article III analysis, the FCC apparently found in this case that Petitioner met the constitutional requirements for standing.

In *UCC I*, then-Judge Burger firmly established the principle of listener standing, finding that listeners, as members of the "consuming public", have "an obvious and acute" interest in FCC regulation of broadcasters. 359 F.2d at 1002. In support of this principle, Judge Burger recognized the essential role of listeners serving as "private attorneys general" to bring programming problems or violations to the FCC's attention and to appeal in court if necessary. *Id.* at 1003-1005. This Court has cited *UCC I* with approval on several occasions, including in its discussions of standing.[3]

Following *UCC I*, at least four different courts of appeal in addition to the D.C. Circuit have extended this principle to afford citizen standing "in virtually every...situation involving broadcast programming regulation...." *Maier v. FCC*, 735 F.2d 220, 229 (7th Cir. 1984). *See Council for Employment & Economic Energy Use v. FCC*, 575 F.2d 311 (1st Cir. 1978) (fairness doctrine); *NBMC v. FCC*, 791 F.2d 1016 (2d Cir. 1986) (broadcast frequency allocations); *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984) (fairness doctrine and personal attack complaints); *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975) (cable access channels). *See also Llerandi v. FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988) (radio ownership rules); *Geller v. FCC*, 610 F.2d 973, 976 n.26 (D.C. Cir. 1979) (cable-broadcast copyright rules); *Illinois Citizens Committee v. FCC*, 515 F.2d 397 (D.C. Cir. 1975) (obscenity issue in forfeiture proceeding against licensee); *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970) (excessive concentration of media ownership).

The decision below clearly contradicts these precedents, creating conflicts between the circuits and serious uncertainty in the law in this area. Perhaps more importantly, it threatens to significantly harm the public interest by severely limiting listener standing.

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[3]*See, e.g., CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981); *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976); *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970).

2. *The decision below raises issues of exceptional importance because of its implications for the rights of radio and television listeners and for resolving issues of alleged broadcast indecency*. The court below failed to recognize that listeners are the primary beneficiaries of broadcast regulation, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), and that the FCC has placed great reliance on listeners as "private attorneys general" to identify potential regulatory problems. *See UCC I*, 359 F.2d at 1002. In the context of indecency, for example, the FCC does not take action on its own initiative or issue declaratory rulings on planned programs, but relies exclusively on listener complaints. *See William J. Byrnes*, 63 RR2d 216 (1987). Judicial review of such complaints where necessary is an important component of this process, assuring listeners and parents of redress if the agency errs.

In the specific context of indecency enforcement, moreover, there are important reasons for prompt judicial review based on a contemporaneous record, rather than waiting up to seven years until license renewal time to consider the issue, as suggested by the panel below. Prompt, contemporaneous rulings on the scope of indecency enforcement are critical to protecting the First Amendment rights of broadcasters and listeners. Without contemporaneous adjudications, broadcasters might avoid presenting news and other innovative programming that could conceivably risk "indecency" violations and loss of their license. Prompt adjudications are necessary to prevent such self-censorship, which shackles the broadcaster and deprives the listening public of valuable programming that they otherwise would have received.[4] In addition, broadcasters and the public, including those like the

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[4]In fact, several respondents here, including NPR, are parties in another case on appeal to the D.C. Circuit, *Action for Children's Television v. FCC*, No. 93-5178, which specifically contends that FCC procedures for the imposition and judicial review of broadcast indecency sanctions violates the First Amendment by not providing for sufficiently prompt disposition of indecency complaints.

Petitioner interested in preventing what they regard as indecent broadcasts, have an interest in prompt adjudications of indecency complaints so that broadcasters do not unwittingly continue to present material that years later is deemed to be "indecent." Particularly because of the central role of the D.C. Circuit in FCC matters, the decision below frustrates these important interests, warranting review.

This conclusion is illustrated by the concerns expressed by broadcasters in this very case. Notwithstanding their arguments in this Court, Respondents NPR *et al.* specifically explained below that in the indecency context, "it is vital that challenges [by members of the public] be resolved promptly and contemporaneously by the FCC *and the courts*." Response to Suggestion for Rehearing *En Banc* at 3 (emphasis added). They further maintained that "serious problems would arise if such challenges could be deferred until license renewal -- which in the case of a radio station might not occur until some seven years after the disputed broadcast." *Id.* As *NPR et al.* explained, broadcasters' most likely response would be to self-censor programs that "could conceivably generate indecency complaints and the loss of [their] license," and such self-censorship could be "minimized only if all indecency complaints are fully and finally resolved promptly after the broadcast," *id.*, a result precluded by the decision below.

3. *The panel's decision conflicts with applicable decisions of this Court.* In ruling that Petitioners had not met the requirements for standing, the lower court concluded that it was speculative whether NPR would change its programming in response to FCC sanctions. *Branton v. FCC*, 993 F.2d at 911. The court based its conclusion on the faulty notion that radio stations might intentionally flout the FCC's indecency rules, deciding that the benefits of broadcasting similarly indecent material outweigh the costs of breaking the law and incurring FCC fines. *Id.* The court's reasoning has no basis in the record, in actual practice, or in this Court's precedent, and would ratchet up this Court's requirements for standing to an insurmountable level. It sets a dangerous precedent that should be reviewed by this Court.

The court below effectively stood logic on its head by arguing that a publicly accountable institution with no prior history of violating FCC regulations will rationally choose to break the law. To the contrary, the logical presumption is that public and regulated private institutions will conform their behavior to the law as established in administrative and judicial decisions. As the FCC explained below, "a fundamental assumption underlying the FCC's enforcement of 18 U.S.C. §1464 is that such enforcement will deter future violations of this statutory provision." FCC and U.S. Response to Petition for Rehearing, at 7. Indeed, the court's reasoning would call into question the FCC's entire scheme of licensing and enforcement.

In this regard, the lower court grievously misapprehended the very nature of the licensing process in assuming that whether or not to violate an FCC regulation is merely a cost-benefit decision based on the dollar value of any sanction. Major violations of FCC rules are rare, presumably because licensees are chosen to serve as fiduciaries based on their character, *see* 47 U.S.C. 308(b), and "the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act ...." *Character Qualifications*, 102 FCC2d 1179, 1183 (1984). They tend to comply with the law because of who they are, not just because of the fear of being caught. While the enforcement process exists to deal with the rare exception, broadcasters go to extraordinary lengths to operate lawfully.[5] Indeed, as the lower

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[5]The panel's suggestion that public broadcasters are less likely to comply with FCC regulations because the prospect of sanctions has lesser deterrent effect on them, *Branton v. FCC*, 993 F.2d at 911, is particularly inapt. Many public broadcasters are state and municipal agencies, and virtually all of them rely at least in part on appropriated federal, state and local funds as well as charitable donations. Their accountability is tested in on-air fundraising, a far more direct measure of acceptance than that faced by their commercial counterparts; news that donors' (or taxpayers') money was forfeited to the FCC could have a devastating impact on them. Their responsiveness is also insured under 47 U.S.C. §396(k)(8)(A), which requires public broadcasters to

court failed to recognize, any broadcaster who willfully or repeatedly violates FCC regulations risks not only a substantial fine, but the threat of far worse penalties, including denial of approval to acquire new stations, permanent revocation of its license, or criminal penalties. *See* 47 U.S.C. §312(a)(6); 18 U.S.C. §1464.

Particularly under these circumstances, the decision below clearly conflicts with applicable precedent in this Court. Unlike cases where this Court has found the effectiveness of sanctions to be too speculative, the nature of the FCC licensing and enforcement scheme and actual practice indicate clearly that FCC enforcement against accountable institutions will have their intended effect. *Compare, e.g., United States v. SCRAP*, 412 U.S. 669 (1973) (finding standing where causation and redressability rested on a far more speculative and attenuated chain of events). In addition, contrary to the lower court's suggestions this Court has never endorsed an argument that enforcement actions may be too speculative because an institution with no history of violating the law might nevertheless intentionally choose to do so on the basis of a crude economic cost/benefit analysis ignoring all other political, social, or moral factors. For example, while the Court in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976), stated that charitable hospitals might forgo favorable tax treatment to avoid the increased financial costs of providing free medical care, the Court never argued that the hospitals might simply violate an Internal Revenue Service decision requiring the hospitals to provide a higher amount of free medical care. Thus, unless there is some evidence in the record of a prior history of violating the law at issue, *see, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), there is absolutely no basis for a court finding relief too speculative because a law-abiding entity

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have community advisory boards. NPR itself has explained the fallacy of the the court's assumption. *See Brief for Respondents National Public Radio, Public Broadcasting Service, Radio-Television News Directors Association and the Reporters Committee for Freedom of the Press in Opposition* ("Brief for Respondents NPR *et al.*") at 9 n.9.

might suddenly decide to violate the law.

In direct conflict with the panel's approach, this Court has long made clear that there is a strong presumption that a party, particularly one subject to federal regulation, will obey, not flout, the law. *See, e.g., Cooper v. Dasher*, 290 U.S. 106 (1933); *Leroy Fibre Co. v. Chicago, Milwaukee & St. Paul Railway*, 232 U.S. 340 (1914). In addition, this Court has ruled that predictive judgments by agencies like the FCC should be accorded judicial deference. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981); *FPC v. Gas Pipeline Corp.*, 365 U.S. 1, 29 (1961). In the context of this case, as NPR itself has stated, the "dire consequences" of broadcasting "material deemed to be indecent" make clear that a ruling that the use of four-letter words in radio newscasts *would* alter future broadcasts, and that such a conclusion is far from speculative. Brief for Respondents NPR *et al.*, at 9 n.9.

The lower court's decision, if allowed to stand, will pose an insurmountable barrier in future cases, because a party seeking standing will be forced to somehow disprove that an institution or individual with no prior history of lawlessness might violate the law. This would impose an impossible hurdle that is not supported by this Court's decisions with respect to Article III standing requirements, and contradicts applicable precedent.

CONCLUSION

For the foregoing reasons, Respondents PFAW/WACCI-VCR respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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April 6, 1994

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITIONER'S BRIEF IN REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 15, 1994

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PETITIONER'S BRIEF IN REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In our Petition, we demonstrated that the court of appeals' determination that Mr. Branton lacked standing to appeal the FCC's denial of his complaint conflicted with other listener standing decisions rendered in the circuits. We showed that listener standing has been routinely and uniformly acknowledged by the courts of appeals as a means to protect the public interest in broadcasting, a position first articulated by this Court more than fifty years ago in *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942).

In the main, the Government does not disagree with our position. It candidly acknowledges, as it did below, that "the court of appeals' analysis was flawed." Brief For the Federal Respondents In Opposition ("Fed. Opp.") at 9. Nevertheless, the Government argues that this case "does not present an appropriate vehicle for this Court to consider the D.C. Circuit's approach to listener standing." *Ibid.*

To the contrary, this case presents a classic controversy requiring the Court's resolution. The conflicts created by the lower court's opinion -- both intercircuit and intracircuit -- are stark. Moreover, the question is important to the growth of the law of standing and there is no evident value in allowing the issue to "simmer" among the courts of appeals.

1. The Government argues (Fed. Opp. at 11) that there is no conflict among the circuits on this issue and that the lower court "did not question either petitioner's standing to seek relief from the Commission or the continuing availability of viewer or listener standing to seek judicial review under established precedent in the court's own circuit." Fed. Opp. at 8. The Government is wrong on both counts.

The lower court's decision is a renunciation of a standard which the D.C. Circuit and other courts of appeals have followed for many years. In a break from its own long-standing precedent, the D.C. Circuit applied the formula of this Court's *traditional standing analysis* -- reflected in such cases as *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) and *Los Angeles v. Lyons*, 461 U.S. 95 (1983) -- to broadcast regulation. The decision thus sets up a direct challenge to the widespread view among the courts of appeals that "*conventional principles of standing are inappropriate in the unique context of broadcast regulation.*" *Maier v. FCC*, 735 F.2d 220, 227 (7th Cir. 1984)(emphasis added). As the Seventh Circuit explained, "the concept of standing in the context of

broadcast regulation is different from that applied in other contexts, because it is the interests of an amorphous, disorganized group called 'the listening public' that are at stake. In order to ensure that the rights of the listening public are adequately protected, courts have construed the concept of standing very broadly." *Id.* at 228.

The Government acknowledges as "well settled" the proposition "that viewers and listeners have standing in various circumstances to sue the FCC to challenge broadcasters' noncompliance" with federal law or agency regulations. Fed. Opp. at 4. The Government likewise acknowledges that the "liberalized standing" conferred upon radio listeners and television viewers, predicated upon the public interest in broadcasting, "is consistent with Article III." *Id.* at 6 n. 3. Furthermore, the Government cites with approval the application of this standard through the years by "the D.C. Circuit and other courts of appeals" and "in a number of contexts." *Id.* at 7. Yet, the lower court's opinion is a clear departure from the decisions of other circuits, *e.g.*, *Maier*, *supra*, and from its own decisions. *See*, *e.g.*, *Llerandi v. FCC*, 863 F.2d 79 (1988); *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (1975)(involving the statute at issue in this case, 18 U.S.C. § 1464); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (1966). Indeed, the D.C. Circuit has expressly recognized the special role "representatives of the public have ... in FCC proceedings concerning obscenity determinations." *Illinois Citizens Committee*, 515 F.2d at 406.

Thus, in the simplest terms, the question created by the D.C. Circuit's decision is whether the view that "conventional principles of standing are inappropriate in the unique context of broadcast regulation" (*Maier*, *supra*) remains valid law, in light of this Court's standing jurisprudence of the past decade.

2. Notwithstanding the Government's view that the lower court's standing analysis was erroneous, it suggests that review by the Court of the merits of Mr. Branton's standing to appeal is inappropriate. The Government's position directly contradicts the arguments it presented to the court of appeals.

First, the Government is concerned that because the record "does not indicate whether and to what extent petitioner was a repeat listener of stations carrying NPR, it does not provide a well developed factual setting for evaluating the court of appeals' application of this Court's injury-in-fact cases to the context of viewer and listener standing." Fed. Opp. at 10; *see also id.* at 8.

In its response to the intervenors' rehearing petition, the Government rejected this argument when it was articulated by the court of appeals in the decision below. The court had asserted that the prospect of Mr. Branton's again being confronted with indecent programming was too "marginal" to satisfy the "immediacy" requirement of Article III, implying that other types of cases (as opposed to indecency complaints) might meet that test. In response, the Government argued that the "possibility that Branton would be exposed to an indecent broadcast in the future as a result of the decision here seems no more speculative," than the "injury" suffered by complaining viewers and listeners in other cases -- "[y]et the court had no difficulty upholding the [complainants'] standing as listeners." FCC Response To Petition For Rehearing at 5. That is, to put it conversely, the Government argued that if the "immediacy" requirement could not be satisfied in Mr. Branton's case, it could not be satisfied in any number of other cases where the D.C. Circuit and other courts of appeals historically have conferred standing upon a listener or viewer.

Indeed, so radical did that state of affairs strike the Government that it declared: "No one has argued -- and no court has even suggested -- that the 'immediacy' element of

constitutional standing analysis, as applied to a viewer/listener's challenge to FCC rejection of an argument related to broadcast programming, required anything more than that the viewer/listener reside within the service area of the station at issue." FCC Response To Rehearing Petition at 3. It is thus incongruous for the Government to argue at this stage that a different factual setting will provide a better light in which to evaluate the lower court's divergent standard. As the Government previously recognized, the fundamental problem with the lower court's approach is that other fact patterns cannot, by the very nature of the immediacy requirement imposed below, give flexibility to the lower court's test. The immediacy requirement either must be so relaxed as to make the test no different in effect than the "liberalized" approach typically applied to viewer/listener standing cases -- in which case the standard is devoid of real meaning, or the immediacy requirement will foreclose a host of plaintiffs who historically have been permitted to challenge broadcast regulations from doing so in the future.

Thus, the Government's "wait and see" attitude is no more appropriate in this setting than it would be, for instance, in a case where one appellate court ruled that a certain federal constitutional provision did not apply to the states while, on the same issue, other appellate courts had ruled to the contrary. It would not be conceptually valid to suggest that other fact patterns might crystallize the controversy -- for the approaches are incompatible. The Government made this same point in pragmatic terms to the court below. The panel's approach, said the Government, "would likely create practical difficulties in determining how much alleged misconduct is sufficient to establish injury for purposes of viewer/listener standing." FCC Response To Petition For Rehearing at 5.

The lower court's standard works a radical curtailing of the universe of plaintiffs with standing to challenge broadcast regulations. This Court may decide ultimately that such a limitation is sound, but it is disingenuous for the Government to pretend that anything less than this is at stake in this case.

Second, the Government states that review is inappropriate because Mr. Branton's "complaint did not specify what sanctions he sought from the FCC" and that "[u]nder the court of appeals' reasoning ... it would appear that a complaint requesting license revocation would appear to be cognizable under the court's reading of *UCC*." Fed. Opp. at 10. Again, the Government has oscillated. Before the court of appeals, the Government took the opposite position:

> The panel appears to leave open the possibility that Branton would have been able to satisfy the injury-in-fact requirement if he had come to the court complaining about an FCC decision to renew a license of a broadcast station that had broadcast the program which, ..., violated 18 U.S.C. 1464. *Id.* Contrary to the panel's implication, there does not appear to be any basis for a distinction between the renewal and complaint context for purposes of the 'injury-in-fact' analysis.

FCC Response to Petition For Rehearing at 5. As we demonstrated in our Petition at 15-18, there are various remedies available to the FCC, including license revocation. The difference between a formal license revocation and lesser sanctions is one of degree. Thus, we see no logic in the Government's position (Fed. Opp. at 10) that a complainant's standing is a function of the severity of the sanction he petitions the FCC to impose. A complainant has no greater or lesser interest to challenge a license renewal or to seek a license revocation than he has to seek a lesser sanction.

3. As we noted above, this is not a case where this Court's permitting the issue to play in the courts of appeals will be beneficial. The competing standards of listener standing at issue -- the approach adopted by the D.C. Circuit in this case *vs.* the liberalized approach which has been applied heretofore in the broadcast context -- are conceptually incompatible. The "immediacy" component of the traditional standard -- in the sense of a direct, particularized injury -- is not required under the standing analysis which the courts have followed in the broadcast context. Because of the force of the "principle that private parties are needed to vindicate the public interest in Commission proceedings" *(Maier,* 735 F.2d at 228), it has been sufficient that a listener simply demonstrate that he reside's within the service area of the station. Absent the "immediacy" linchpin of traditional standing analysis, it is difficult to envisage how other circuits' application of the *Maier* approach can be affected one way or another by the D.C. Circuit's application of the traditional standing approach. That another court of appeals might one day be receptive to the D.C. Circuit's approach only perpetuates, it does not resolve, the question whether such an approach is lawful in the context of listener/viewer standing.

The Government's attempt to distinguish this case from the Seventh Circuit's holding in *Maier v. FCC, supra,* misses the mark. Given the enunciation of the listener standing approach explicitly set forth in *Maier,* it cannot seriously be contended that Mr. Branton's case would have been dismissed for lack of standing had it been reviewed under the *Maier* standard. That standard confers standing upon a listener or viewer by virtue of his residence within the service area of the broadcast station. As the *Maier* court observed, "a direct, concrete, particularized injury is unnecessary for a party to have standing as a representative of the public interest. *Maier,* 735 F.2d at 229-230. A contrary position is "not only ... completely unprecedented but also would undermine

seriously the functional relationship between the Commission and the courts of appeals." *Ibid.* This case, of course, includes the further "injury" of an offense to a listener's sensibilities, making it an even plainer matter under the Maier standard.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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